The Chester County Hospital *and* International Brotherhood of Teamsters, AFL–CIO, Local 312. Case 4–CA–21243

December 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

This case presents questions whether the judge correctly found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union and by unilaterally failing to give bargaining unit employees a scheduled across-the-board wage increase, and that the Respondent violated Section 8(a)(1) by engaging in surveillance of, or creating the impression of surveillance, of protected employee union activities.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, the Chester County Hospital, West Chester, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On July 14, 1995, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also has excepted to the judge's decision asserting that it evidences bias and prejudice. On our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or exhibited impermissible bias against the Respondent in his analysis and discussion of the evidence.

Richard P. Heller, Esq., for the General Counsel.
G. Roger King, Esq., of Columbus, Ohio, and *Julia M. Bros, Esq.*, of Washington, D.C., for the Respondent.
Mark P. Muller, Esq., of Chester, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Philadelphia, Pennsylvania, on February 1, 2, and 3, 1995. The charge and amended charges were filed respectively on November 23 and 30, 1992, and January 11 and 21, 1993, by International Brotherhood of Teamsters, AFL–CIO, Local 312 (the Union).[1] The complaint, which issued on July 20, 1993, alleges that the Chester County Hospital (the Company or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly (1) engaged in surveillance of employees' union activities, (2) unilaterally failed and refused to provide bargaining unit employees with a scheduled across-the-board wage increase, and (3) failed and refused to bargain in good faith with the Union over the terms of a collective-bargaining contract. The Company's answer denies the commission of the alleged unfair labor practices, and affirmatively contends, in sum, that: (1) the Company fulfilled its bargaining obligations, (2) the Union bargained in bad faith, (3) the instant charge was not timely filed with respect to the alleged unilateral failure to grant a wage increase, and (4) the Union and the Board are estopped from proceeding with respect to the alleged 8(a)(5) violations, by reason of positions taken by the Union in the negotiations. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and the Company each filed a brief.

On the entire record in this case,[2] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Pennsylvania corporation, is engaged in the operation of an acute-care not-for-profit hospital (the Hospital) located in West Chester, Pennsylvania. In the conduct of its operations, the Company annually derives gross revenues in excess of $250,000, and annually purchases and receives at its hospital goods and materials valued in excess of $50,000 directly from points outside Pennsylvania. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health-care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION AND THE BARGAINING UNIT INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act. On December 3, 1991, following a Board-conducted election, the Union was certified as collective-bargaining representative of the Company's employees in the following unit:

[1] All dates are here are for 1992 unless otherwise indicated.

[2] By a ruling and order dated April 6, 1995, I directed that the stenographic transcript of proceedings be corrected in certain respects.

> All full-time and regular part-time skilled maintenance and groundskeeping employees employed at the Company's 701 East Marshall Street, West Chester, Pennsylvania facility, excluding all other employees, office clericals, guards and supervisors as defined by the Act.

The certified unit consisted of about 20 skilled maintenance employees. At all times since December 1991, the Company has employed about 1400 employees. Other than the certified unit employees, none of the Company's employees were represented by any labor organization during this time period.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Contacts Between the Parties and an Overview of the Negotiations*

By letter dated December 3, 1991, Company Counsel Steven B. Silverman informed Union Secretary-Treasurer Tim Lehman that: *Historically, the Hospital has had a wage policy for all of its employees consisting of an annual across-the-board wage increase*, together with an annual review for each employee on the employee's individual anniversary date of employment'' (Emphasis added.) Company counsel indicated that some bargaining unit employees had upcoming employment anniversary dates. He added that the Company had a discretionary Christmas bonus ''which it intends to grant to all of its employees.'' Company counsel added that in view of the Union's certification, and the Company's wish to avoid taking unilateral action, he was requesting the Union's view on how to handle these matters.

Union Secretary-Treasurer Lehman promptly replied. By letter also dated December 3, 1991, he asserted that when negotiations began, all issues, including wages, would be bargainable, and that until that time, the Union had ''no problem with the Company continuing its normal policies concerning wage and salary review and Christmas bonus.'' Lehman declared: ''*As long as the hospital adheres to its established policy concerning the items raised in your letter during the interim, until an agreement is reached, we do not intend to challenge it.*'' (Emphasis added.) Lehman requested a copy of the Company's wage and Christmas bonus policies in order to ''monitor them.'' In a subsequent letter dated January 3, 1992, Lehman requested additional information, including the classification and wage schedules and benefit policies. The General Counsel does not contend that the Company failed to furnish the Union the requested information.

It is undisputed that in July 1991 the Company granted an across-the-board wage increase to all its employees.

The Company, by its December 3, 1991 letter, unequivocally told the Union that the Company had an established policy of granting an annual across-the-board increase to all its employees, i.e., that it did not regard the increase as discretionary (apart from the amount) or subject to limitation to less than all its employees. The Company highlighted this assertion by distinguishing the increase from annual individual reviews, and from the Christmas bonus, which it regarded as discretionary, albeit granted to all employees. The Union, in its response, made clear that it had no objection to the Company's asserted policies, and anticipated that until a contract was reached, the Company would follow such practices with respect to the unit employees, including the annual across-the-board wage increase.

On February 21, union and company representatives met preliminary to commencement of formal contract negotiations. Present for the Union were then Union Secretary-Treasurer Timothy Lehman, Union Vice president Ted Uniatowski, and Union General Counsel Mark Muller. Present for the Company were its counsel, Roger King, and Assistant Director of Human Resources Mark Felici.

The union representatives asserted in sum that they wanted to maintain existing benefits and wages. They said the unit employees were principally concerned about job security and their perceived need for a grievance-and-arbitration procedure. They indicated they would request standard ''boiler plate'' language on union security, dues checkoff, grievance and arbitration, and several other matters. Lehman opined that the negotiations should be easy.

Attorney King, the Company's principal spokesperson, disagreed with Lehman's appraisal. He opined that there would be difficulty in accepting the Union's boilerplate language. King said the Company was concerned that the Union would expand its organizing efforts throughout the Hospital. Lehman said that the Union was not then interested in organizing other employees, but its main concern was getting a contract for the unit employees. The company representatives did not, at this meeting, indicate any problems with maintaining existing benefits and wages. The parties scheduled negotiations to commence on March 17.

The parties met in 20 negotiating sessions over a period of nearly 2 years. They met on March 17, April 9, May 27 and 28, June 19, 25, and 26, July 8, 22, and 23, August 25, September 2, October 7, 28, and 30, and November 9, 1992. After the Union filed the present unfair labor practice charges, the parties resumed contract negotiations. They met on March 29, May 17, July 14, and December 22, 1993. They never reached agreement on a contract.

The Union's negotiating team initially consisted of Vice President Uniatowski, Secretary-Treasurer Lehman, and Unit Steward Doyle Donovan. Uniatowski served as union chief negotiator in the first two sessions. Thereafter, he remained on the union team throughout the negotiations. Lehman, who had supervisory authority over Uniatowski, occasionally attended negotiating sessions. Unit employee Ed Hoxter sometimes substituted for Donovan. Donovan last attended a bargaining session on October 30, 1992. Sometime thereafter, the Company discharged Donovan. Dan McCullough replaced him as union steward.

Union Counsel Mark Muller did not attend the first two bargaining sessions. The Union preferred that its counsel not participate in negotiations. However, Muller subsequently assumed union office (on April 1 as vice president and on May 4 as business agent). Thereafter, Muller functioned as the Union's chief negotiator.

Attorney King was the Company's chief negotiator. Company Assistant Director of Human Resources Mark Felici attended the negotiations through March 29, 1993. Subsequently, he left the Company's employ. Company Director of Human Resources Richard Bramble replaced Felici in the negotiations. Company Assistant Vice President for Support Services Louis Guardiani was present throughout the negotiations.

Among the participants, Muller, Felici, and Guardiani took notes during the negotiations. These notes were presented in evidence. Felici took the most copious notes. Muller testified that his purpose in taking notes was to keep track of contract proposals and their status.

Among the participants, Muller, Felici, Guardiani, and Bramble testified concerning the negotiations. Muller and Felici were the principal witnesses respectively for the General Counsel and the Company.

Felici testified in sum as follows concerning his approach to the negotiations. He wanted a contract which was in the best interests of the Company and the Union. He did not know or even consider how the Union or the unit employees would react to each company proposal. He viewed the bargaining as a ''give and take'' process. At a subsequent point in this decision, I shall discuss the significance of this testimony.

During the course of the negotiations, the Union on four occasions presented comprehensive contract proposals (March 17, October 30, and November 9, 1992, and by letter dated February 25, 1993). The Company never submitted a comprehensive contract proposal. Rather, the Company presented its proposals on a piecemeal basis, beginning with its first proposals at the May 27, 1992 session, and continuing thereafter. The Company variously submitted initial subject matter proposals on May 27 and 28, June 19 and 25, July 8, 22 and 23, and November 9, 1992.

B. *The First Phase of Negotiations (March 17–June 26) and Company Actions with Respect to Personnel Policy*

Union Vice President Ted Uniatowski drafted the Union's proposed contract, which he presented to the Company at the first session on March 17. The following is a summary of the Union's principal proposals:

1. *Union recognition*. Recognition for the certified unit, i.e., in the language of the certification. The certified unit included one regular part-time employee. The other employees were fulltime.

2. *Union security and checkoff*. A standard, or conventional, 30-day union-security clause and checkoff of union dues and initiation fees. The Company would also deduct voluntary employee contributions to DRIVE. Both union security and checkoff are subject to and as permitted by law.

3. *Seniority*. Promotional opportunity and job security should increase in proportion to length of continuous service. Both full-time and part-time employees would have seniority rights.

4. *Layoffs* would be in inverse order of seniority.

5. *Recall* would be in inverse order of layoff.

6. *Job stewards*. The proposal spelled out the duties of stewards, including investigation, presentation, and processing of grievances, without loss of pay. Stewards would have superseniority as to job security. The Company could impose greater discipline against a steward for violation of the no-strike clause.

7. *Inspection Privileges* (visitation). The Union would be entitled to access to the Hospital to investigate working conditions, adjust disputes, collect dues, and determine contract compliance, provided there was no interruption of the Hospital's working schedule.

8. *Suspension and Discharge*. These required ''just cause,'' written notice to the employee and the Union, and one prior written warning (except for four causes). If proven that the suspension or discharge was unjust, the employee would be entitled to reinstatement with backpay. Disciplinary notices would remain in effect for a maximum of 6 months (Inserted change to 12 months).

9. *Grievance procedure–Arbitration*. A three-step procedure with ''final, conclusive and binding arbitration'' as the final step. A grievance is defined as any question raised under the contract or dispute raised by the employee or the Union. The arbitrator has no power to change the contract. Arbitration fees are divided equally between the Company and the Union. The steward is permitted time to investigate and adjust grievances. Settlements and decisions are final and binding.

10. *No-strike or lockout*. Employees are subject to discipline, including discharge, for striking during contract term. However, it is not a contract violation for employees to refuse to cross a primary picket line or enter premises involved in a primary labor dispute.

11. *Military Service*. (In accordance with law.)

12. *Wages*. Annual successive increases of 20 cents, 25 cents, and 30 cents per hour, plus C.O.L.A. based on current company policy. Time and one-half for all hours worked over 8 hours per day or 40 hours per week. The proposal added a stricken notation concerning certain alleged problems, specifically, working alone on off-shifts, and pay for weekend work.

13. *Benefits*. All current benefits shall remain in effect and increased whenever increased for nonunit personnel (''me-too'' clause). These include vacations, holidays, sick leave, jury duty, health and welfare, pension, shift differential, leadman premium, and funeral leave. As will be discussed, these benefits were described in the Company's employee handbook and other company-generated documents.

14. (Omnibus). All current practices and policies would be presented to the Union for discussion at the bargaining table.

15. *Subcontracting*. Not permitted if such would result in layoff or reduction of work or earnings opportunity for unit employees.

16. *Posting of Notices*. The Company will provide the Union with a bulletin board.

17. *Extra Contract Agreements*. The Company will not enter into agreements with its employees which conflict with the contract.

18. *Non-Discrimination*. Insertions limit clause to bargaining unit employees.

19. *Savings and Severability*. If a contract section is held invalid, the parties will negotiate. If no agreement, the Company will be bound by the Union's position if upheld by a tribunal of competent jurisdiction or an agreed-on tribunal.

20. *Term of Contract*. Three years.

The parties reviewed the Union's proposals, with the Company asking questions concerning the proposals. The Union asserted that grievance-arbitration was important, as this was the main reason they were there. The Union said they had union security and checkoff in all their private sector contracts, and expected both in this contract. The Union also stated that both were in boilerplate language, and that the proposed steward clause tracked the language of the Union's International constitution and bylaws.

The parties also set certain ground rules. They agreed to share the cost of the negotiations. Union Counsel Muller tes-

tified (with respect to the February 21 meeting) that they agreed to discuss wages last. Company Assistant Director of Human Resources Felici testified that the Company proposed, and the Union agreed, that where possible they would hold off on economic issues until a substantial part of the contract was discussed. However, Company Assistant Vice President for Support Services Guardiani's notes indicate that among other ground rules, the parties agreed: ''non-economic issues first. Then money.'' I find that his notes probably reflect what was agreed.

By letter dated January 30 (prior to commencement of negotiations) Company President H. L. Perry Pepper informed all hospital employees that during the period February 12 to 15, the Company would conduct an opinion survey to determine how to improve the organization. Participating employees were eligible for inclusion in a drawing for a free vacation trip. By letter dated February 12, the Union confirmed to the Company that it had no objection to unit employees participating in the survey.

The Company proceeded with the survey, which was conducted by an outside consultant. Although ostensibly providing for anonymity, the survey questionnaire requested employees to identify themselves by department, position, length of service, shift, and status (full or part time). The questionnaire solicited employee opinion on a wide range of attitudes, including whether they were treated fairly, whether tardiness and absenteeism were handled fairly, whether benefits (generally and specifically) compared favorably, whether discipline was consistent, and whether employees got a fair hearing. The employees were invited to add their comments. In addition, some employees were selected for interview with the outside consultant.

In mid-April, Company President Pepper informed the employees concerning the survey results. Pepper asserted that most employees felt that pay and benefits were generally comparable to other area hospitals, and that pay was generally fair, but that dental coverage, pension, and time off for disability should be reviewed. Pepper reported that the employees wanted a fair hearing on their grievances, and improvements in the merit increase system.

Pepper further reported to the employees concerning company measures (in addition to the survey), which, he submitted, were designed to improve the quality of the Hospital's operation and ''the quality of work life here for each employee.'' One such measure was a ''Continuous Quality Improvement'' program (CQI), which included the formation of a ''Quality Improvement Team'' (QIT) in each department. The Company had, earlier in 1992, already commenced implementation of this program. Pepper requested the employees to participate in the program. Assistant Company Vice President for Support Services Guardiani testified that the CQI program was voluntary, i.e., that employees were not required to participate.

Pepper also informed the employees that in response to their desire for a fair hearing on their grievances, the Company would implement a ''Peer Review Grievance process.'' In December 1992, Pepper informed the employees that the Company would be implementing such process in March 1993. The process included two systems of review. One (''Dispute Resolution Process'') purported to be a three-step grievance procedure providing for appeals to management up to the level of corporate vice president. This would include review of suspensions pending discharge. The grievant would have the benefit of an ''employee assistance representative.'' The second system dealt with certain issues involving employee dissatisfaction. A ''Peer Review Panel,'' consisting of two managers and three employees, would render a final decision. The Peer Review Grievance Process applied only to nonbargaining unit personnel.

When the parties convened at their second bargaining session on April 9, they discussed the CQI program (sometimes referred to as ''Total Quality Management'' or ''TQM''), the Company explained CQI, and asked if the Union would agree to the unit employees joining the program. Union Steward Donovan, after reading a description of the program, said he saw no problem with the employees joining a QIT. Guardiani testified that the Union expressed concerns about the program but seemed receptive. The Company asked the Union to get back on this. Felici's notes indicate a reference to employees resigning from the QIT, and ''we cannot force anyone to join.''

The Company then proceeded to give verbal responses to the Union's proposals. The Company agreed that the introductory paragraph was generally acceptable, but they wanted different wording. On recognition, the Company wanted to exclude the regular part-time employee, coupled with a formula applicable to temporary help.

The Company indicated, in sum, that it was categorically opposed to union security and/or dues checkoff. Felici testified that on several occasions, the Company explained its ''philosophy'' that the unit employees ''should have the ability to choose whether or not to join the Union and that the Union should be responsible for collecting the dues.'' Muller testified that the Company said they didn't collect for other organizations and would not start with union dues. The Company never deviated from its opposition to either union security or checkoff.

Union Attorney Mark Muller testified that he did not recall the Company objecting to the union security proposal on the ground that the proposal failed to comply with *Communication Workers v. Beck*, 487 U.S. 735 (1988), although it is possible that the Company did so (as indicated, Muller was not present at the March 17 and April 9 sessions). None of the company witnesses testified that the Company took such position, nor do their notes indicate such position. I find that the Company asserted its objection to union security solely on its alleged philosophic position as testified by Felici.

The Union told the Company that all but two unit employees had signed membership cards. Felici testified that on several occasions the Union said it would not sign or agree to a contract without union security or checkoff.

The Company will, on request, make deductions from employee paychecks for 16 different items, including taxes, health insurance programs, tax shelter annuity, credit union, and repayment of advances. Code numbers are available for additional deductions. Company Human Resources Director Bramble testified that all deductions were for company-sponsored programs or governmental entities. However, the Company will deduct for contributions to United Way, which is neither company sponsored nor governmental. When confronted with this fact, Bramble gave two explanations: (1) United Way contributions were appropriate for deduction be-

cause ''not required,'' and (2) the Company has been deducting for United Way for a long time.

The following is a summary of the Company's principal further responses to the Union's proposal: On *Seniority*, the Company wanted seniority only for full-time employees, proposed 90-day probation for new full-time employees and 180 days for part-time employees (instead of 30 days as proposed by the Union) and questioned the need for posting of seniority. On *Layoff*, the Company wanted choice based on needed skills, with seniority only as a tie breaker. On *Recall*, the Company wanted choice based on its needs. On *Stewards*, the Company rejected compensation for time spent on steward business, and rejected superseniority. On *Inspection privileges*, the Company expressed some thoughts for a counterproposal, including provision for advance notice. On *Suspension and discharge*, the Company gave various responses, including agreement, rejection, questions, put on hold, qualification, or that it would submit a counterproposal. On *Grievance-arbitration*, the Company indicated that it would submit a counterproposal, discussed some specifics, and stated that it wanted the right to appeal the arbitrator's decision. On *No-Strike or lockout*, the Company rejected the primary picket line-primary strike exception. On *Military Service*, the Company indicated no problems. On *Wages*, the Company requested a hold, because economic issues had not yet been addressed. On *Benefits*, the Company also requested a hold, in order to review costs. On *Omnibus*, the Company indicated it would discuss policies and procedures, and propose a zipper clause which would preclude bargaining on any matter not in the contract. On *Subcontracting*, the Company rejected the Union's proposal, indicating that it intended to continue operating as it saw fit. On *Posting of Notices*, the Company indicated that it wanted such posting limited to the maintenance shop and to unit business. On *Extra-Contract Agreements*, the Company indicated ''okay.'' On *Non-Discrimination*, the Company indicated that the concept was agreeable, but they had to work on the language. On *Savings and Severability*, the Company also indicated that the concept was agreeable, and that the Union would provide additional language. On *Term of Contract*, the Company requested a hold, and raised a question as to whether there should be a wage reopener.

Felici's notes indicate that the Union responded to the Company's statements of position.

By letter dated May 13 to the Union, Felici confirmed that the Union agreed to formation of a QIT which would include the unit employees, and that Union Unit Steward Donovan would be the team leader.

When the parties met in their third negotiating session on May 27, they again discussed the CQI program; although (as stated by Company counsel King and noted by Company Assistant Vice President for Support Services Guardiani) CQI and the negotiations were separate issues. The Company complained that unit employees were dropping out of the program. Uniatowski pointed out that the program was voluntary. Donovan said that the employees were upset because the negotiations were taking too long. He also raised a question as to the legality of the program, referring to *E. I. du Pont & Co.*, 311 NLRB 893 (1993).

At the May 27 session, the Company submitted five written contract article proposals: shift differential, overtime, management rights, alteration of contract and waiver, and no strike-no lockout.

On shift differential, the Company proposed a 75-cent-per-hour differential for hours worked on both the second and third (evening and night shifts). This differed from the Company's existing practice, under which second-shift employees received a differential of 75 cents per hour, and third-shift employees received a differential of $1.50 per hour.

The Company's proposal did not require any minimum number of hours scheduled or worked in order to qualify for differential pay. Under the existing practice, employees had to be scheduled for at least 4 hours of premium work in order to qualify. According to Felici, this was an example of the ''give and take'' process which the Company used as a ''chip'' to get a good contract. However, among the unit employees, the Company had one full-time employee working the third shift, with a relief employee replacing the third-shift employee on weekends when the regular third-shift employee was not working. Consequently, the presence or absence of a 4-hour minimum requirement had little or no relevance to the situation of the unit employees. The only significant effect of the Company's proposal would be a 75-cent-per-hour pay reduction for the third-shift employee and his weekend replacement. In sum, the proposal was one of ''take'' without any meaningful ''give.''

Company Officials Felici and Guardiani gave conflicting explanations as to the basis for the Company's shift-differential proposal. According to Felici, the Company conducted an area wage survey, which constituted the rationale and basis for the Company's wage proposals, including shift differential. Felici testified that he and Guardiani used the survey in developing their wage proposals. The survey was not shown to the Union. Felici testified that the survey showed that some area employers paid shift differentials which exceeded $1.50 per hour. The Company introduced in evidence a purported wage survey, covering only maintenance positions, which indicated that one area hospital (Brandywine) paid a wage differential comparable to the Company's third-shift differential (range of $1 to $1.50 per hour). Nevertheless, Felici testified that he concluded that the shift differential for the unit employees was ''above market.''

Felici testified that the wage survey was prepared about 1 month before the Company presented its wage proposal (July 8). His testimony raises a question as to whether the Company even had the alleged survey by May 27, when it presented the shift-differential proposal. Guardiani testified in sum that he took the initiative in preparing the shift-differential proposal, that he did not know whether the proposal was prepared before or after the wage survey, and he was not familiar with the survey. Guardiani testified that he based his consideration of area wages on his knowledge of the Pottstown Hospital union contract (Guardiani previously worked at that hospital).

The Company has about 1100 full-time employees and about 300 part-time employees. About 60 to 65 percent work the day shift, about 25 percent are on the evening shift, and about 10 percent are on the night shift. In sum, about 100 to 140 employees qualify for the $1.50-per-hour shift differential. The Company had more than nine classifications of employees who were eligible for shift differential. Felici testified that the differential was ''above the market'' for ''nursing and physical therapists,'' but this was traditional

for a ''country hospital.'' However, Felici admitted that although the company hospital is located outside of the Philadelphia metropolitan area, it is not in a rural area. Felici further testified that he considered the shift differential for registered nurses to be ''within . . . [a]cceptable market,'' although their differential might be as much as 25 cents per hour above market.

Felici testified that the Company conducts annual wage surveys, which sometimes include wage differential. However, Company Human Resources Director Bramble (who has held his position since 1972), testified that the Company annually reviews shift differential, together with other wage issues. Felici and Bramble testified in sum, that the Company has never reduced the wage differential for any of its employees.

The Company never deviated from its position on shift differential, and the parties never reached agreement on this matter.

In sum, the Company contends that in May 1992, it suddenly discovered that among all of its employees who were eligible for third-shift differential, the only ones who were so overpaid as to warrant a drastic reduction in that differential were those in the small unit represented by the Union. I find this assertion incredible. In light of the testimony of the company witnesses, it is evident that the Company had long been well informed concerning prevailing area shift differentials, and saw no reason to change its practices until the Union came on the scene. Their testimony and in particular the contradictions and inconsistencies in their testimony further demonstrate that the Company had no new wage survey or other pertinent information when it prepared and presented its shift-differential proposal. I find that the Company had no valid objective or subjective basis for proposing drastic reduction of third-shift differential, and that the proposal was not made in good faith.

On overtime, the Company proposed time-and-one-half for hours worked over 8 hours daily and 80 hours during a 14-day period for employees on the ''8/80'' basis, and for hours worked over 8 hours daily and 40 hours weekly for employees on the ''8/40'' basis. The Company proposed that sick days, vacation time, and any other nonworktime shall not be counted as hours worked for the purposes of overtime. In other respects, the proposal did not materially differ from current hospital policy.

Under current company policy, as set forth in the employee handbook, holiday, vacation, and sick pay are counted as time worked for purposes of calculating overtime pay. In this regard, the Company was proposing a reduction in pay standards for unit employees.

Union Negotiator Muller testified that under current practice, the Company paid time-and-one-half after 8 hours per day and 40 hours in a pay period. Human Resources Director Bramble testified that under current practice, the Company paid daily (over 8 hours) overtime only for employees on an ''8/80'' schedule. However, Bramble testified that he did not know whether the unit employees worked on an 8/40 or 8/80 schedule. The employee handbook is silent on this matter. There is no indication that this alleged distinction was discussed in the negotiations.

In the absence of any testimony or other evidence from the Company that the unit employees were not receiving daily or weekly overtime pay, I credit Muller's testimony that unit employees, at least, were paid both daily and weekly overtime. If in fact the Company was offering the employees a benefit which they did not currently enjoy, and which was not apparent on the face of the proposal, then it is probable that the Company would have pointed this out in the negotiations. However, there is no indication that the Company did so.

In sum, with respect to overtime, the Company proposed a reduced pay scale, without any pertinent ''give.'' As will be discussed, the Company did not offer any explanation for its overtime proposal until the 16th negotiating session on November 9.

With respect to management rights, the Company proposed a sweeping clause, which on its face, would effectively preclude the Union from any meaningful negotiating rights during contract term, and preclude the unit employees from any meaningful grievance-arbitration procedure. The Company proposed that management of the Hospital and direction of the unit employees be vested exclusively in the Company, and that such rights, included (among others) the right to suspend, discharge, lay off, assign, and evaluate employees, subcontract or transfer unit work, change working hours, duties and qualifications, and test employees for substance abuse. The clause further provided, in sum, that such management rights were not limited to those enumerated in the clause, but that the clause should be construed broadly.

On alteration of contract and waiver, the Company proposed a clause which, in part, backed away from the Company's previously stated position with respect to the Union's proposal on savings and severability. As indicated (Company Assistant Director of Human Resources Felici's notes), the Company stated on April 9 that the Union's concept was agreeable. However on May 27, the Company presented a diametrically opposite proposal. The Company proposed that if any contract provision were held invalid, that ruling would ''govern and prevail,'' and the balance of the contract would remain in effect.

On no strike-no lockout, the Company proposed language which varied in several material respects from the Union's proposal. The Company proposed, in sum, that the Union was required to take specific measures to end any work stoppage, review of related discipline was limited to the question of whether the employees engaged in any work stoppage during contract term, and the Company could invoke the grievance-arbitration procedure in the event of such work stoppage. The proposal also limited the definition of a lockout under this clause. The Company's proposal did not include a primary strike-primary picket line exception. Although the Union proposed no strike-no lockout as a corollary to grievance-arbitration, the Company did not present its proposal on grievance until June 19, and on arbitration, until June 26.

The parties discussed no strike-no lockout. The Company expressed concern that the employees might engage in a sympathy strike. The Union responded that a construction site picket line on hospital premises would not be a primary picket line, and that if a supplier or carrier were on strike, roving pickets could only picket the delivery truck, i.e., they could not picket the Hospital. The Union also expressed concern that the Company's proposal would make the Union responsible for the actions of its job steward. The Union pointed out that the steward had no authority to call a strike.

The Company again stated its opposition to union security. There was no movement or agreement on any issues at this session.

The parties met again the following day (May 28). The Company proposed a zipper clause as an addition to its proposed article on alteration of agreement and waiver (and counterpart to the Union's proposal on current practices). The Company proposed that it could unilaterally eliminate any past practice or local privilege not covered by the contract. The Company also proposed articles on sick days, layoff and recall, and vacations.

On sick days, the Company proposed (for full-time employees only), paid sick leave commencing with the fourth day of absence due to illness. However, the Company could require a physician's statement for any absence due to sickness or disability. Sick leave could be accumulated at the rate of 5/6 day per month, up to a maximum of 180 days. However, sick leave would not be payable on termination of employment.

The Company's existing practice, as stated in its employee handbook, provided for sick pay for full-time employees, without any minimum absence. The handbook also indicated that sick leave could be accumulated to a maximum of 65 days. However, the Company's summary of benefits states that there is ''no maximum limit on accumulation'' of sick days. Therefore, it is evident that this was in fact the Company's practice. In other respects, the Company's proposal was substantially consistent with company practice.

In sum, the Company proposed to reduce sick leave for unit employees by eliminating paid leave for the first 3 days of any illness (even proven), without offering any pertinent ''give.'' The Union never asked for any increase in permissible accumulation of sick leave. Even if the Company's proposal would increase allowable sick leave, the proposal would have little if any benefit for the unit employees. As sick leave was not payable on termination of employment, an accumulation above 65 days would be of value only in the rare event of a catastrophic illness or injury.

The Company's professed rationale for its sick leave proposal, as testified by Felici and Guardiani, was that unit employees were abusing the sick leave privilege, in particular, by taking off on Mondays, Fridays, or other individual days. Therefore, according to Felici, the Company needed guidelines on use of sick leave. Felici and Guardiani formulated the proposal. Muller testified that the Company explained that the proposal was because of absenteeism on Mondays and Fridays.

In support of its asserted position, the Company presented in evidence, a study of absenteeism in the unit over a 4-year period (1989 through 1992). The study is dated November 2, 1992, and purports to be complete through the pay period October 18, 1992. Therefore, it is evident that the Company did not have the benefit of this study when it prepared and presented its contract proposal.

Moreover, the study demonstrated that, in fact, the unit employees had a generally good attendance record. The study shows that in 1991, the last full year before the negotiations, there were a total of 22 absences on Mondays or Fridays or day before a scheduled day off, and a total of 19 other single-day absences. In sum, this showed an average of one absence per employee in each such category, over the entire year. Guardiani, who prepared the study, was unable in his testimony to identify any unit employee whom he could characterize as a sick leave abuser during the period of the negotiations.

There are other obvious fallacies in the Company's rationale. The Company made no comparative study of other department personnel attendance. Even if unit personnel were abusing sick leave as alleged by Felici and Guardiani, the Company's proposal was a clear case of overkill. The proposal did not simply exclude single-day absences from sick pay. Rather, it excluded the first 3 days of any absence, even if the employee furnished a physician's statement. Thus, even a hospitalized unit employee would not be able to use accumulated sick leave for the first 3 days of absence.

The Company never modified or withdrew its proposal on sick leave. I find that the proposal was designed to be punitive rather than remedial and, like the proposal on shift differential, was not made in good faith.

On vacations, as with shift differential, overtime and sick days, the Company proposed terms which were less favorable to the unit employees than current company practice. The Company, as indicated in the employee handbook, paid part-time employees a bonus, based on a percentage of earnings, in lieu of paid vacation. The Company's proposal would eliminate any vacation compensation for part-time unit employees. The handbook provided, in a flexible manner, that vacations be scheduled by previous and timely arrangement, and approved by the department manager. However, the Company's proposal would impose a strict deadline for vacation requests (March 31), require employees requesting a weekend vacation to obtain a qualified replacement, and prohibit use of vacation time for less than a full day. The Company did not even bother to offer an explanation or justification for its position. I find that the proposal for less favorable vacation provisions was not made in good faith.

On layoff and recall, the Company proposed, with respect to reductions-in-force of more than 60 days, that reductions would be ''based on the abilities and skills of the remaining employees.'' Seniority would be used as a tie breaker only if, in the opinion of the Company, the employees had equal ability and occupational skill. Laid-off employees would be recalled in inverse order of their layoff, subject to the Company's job skill needs. The proposal was silent as to layoffs of 60 days or less. Therefore, under the Company's proposals, the management-rights clause would govern, i.e., the Company would have unlimited discretion as to such layoffs.

Company policy, as set forth in the employee handbook, provides that regular full-time employees have seniority rights. The handbook states that: ''In matters of promotion, demotion, layoff and recall after layoff, physical capability and occupational skill are prime considerations. Where in the opinion of the Hospital, employees have equal skill or entitlement, the decision will be based on seniority.'' The company policy contained no limitation with respect to duration of layoff. Therefore, in this regard, the Company proposed terms which were less favorable to the unit employees than those provided under current company policy.

In sum, with respect to layoffs generally, under existing policy the Company retained sole discretion to decide when seniority would govern, i.e., by determining that the other factors were equal. However, under the Company's proposal, the Company would retain total discretion with respect to layoffs of 60 days or less, without restriction as to seniority,

skills, abilities, or any other factor. Indeed, the Company could extend this discretion to cover any layoff, e.g., by initially laying off employees for 60 days or less, and then extending the layoff. The Company offered no pertinent ''give,'' and offered no explanation or justification for the proposed deviation from its current policy. As discussed, the Company was well aware that job security was a principal concern for the unit employees. I find that the Company's proposal, insofar as the Company proposed less favorable conditions than those under its current policy, was not made in good faith.

Felici testified that at the May 28 session, the Company presented its proposal on job classifications. However, the proposal is dated June 19 (the date of the next session), and the parties stipulated that the proposal related to the June 19 session. Therefore, I shall discuss the proposal in connection with that session.

The parties discussed the issues presented by the Company's proposals. The Union rejected the management-rights proposal. Discussion of sick days focused on requirement of a physician's statement for first-day absence. Felici noted that the union members were ''antsy,'' so they didn't want CQI. He also noted that on union security and checkoff, the Company held to its position that the ''choice is the mens'.'' There was no movement or agreement on any issue. Thereafter, the parties did not discuss CQI until the 16th bargaining session, on November 9.

The parties next met on June 19. By agreement, a Federal mediator entered the negotiations. King summarized the status of negotiations for the mediator. King added that the Company had an old line, ''straight-laced'' management, and they were concerned about unionization spreading throughout the Hospital.

The Company presented contract proposals on job classifications, holidays, and grievance-arbitration, and revised proposals on sick days, vacations, layoff and recall, and management rights. The Union presented counterproposals on management rights and sick days.

The Company's revised proposals on sick days, vacations, layoff and recall, and management rights reflected no material change from the Company's initial proposals. On vacations, the Company proposed to tighten the restriction on weekend vacation by providing that the replacement would not be eligible for overtime pay, without departmental approval. On management rights, the Company proposed an addition which would authorize the Company to act unilaterally and deal directly with employees with respect to matters covered by the Americans with Disabilities Act, including work assignment and schedules, and that the Union waived any right to bargain concerning such matters. In sum, the Company's revised proposals either made no change in the Company's positions, or moved away from, rather than toward, agreement.

On job classifications, the Company proposed to abolish existing job titles and, instead, to group the employees in four job classifications roughly ranging from most skilled to least skilled. The Company further proposed to eliminate the third classification (former title of ''general mechanic'' or ''general maintenance worker'') by attrition.

Felici testified at one point that the Company made this proposal in order to make it easier to formulate the Company's wage proposal. At another point, Felici testified that he could not tell, from the Company's wage proposal, either under the existing or proposed job classifications, whether the unit employees would receive higher, lower, or the same pay, and that the Company did not even consider that factor in formulating its proposals. Guardiani noted that King said they would address the matter of job classifications when they talked about wages. It is evident that the Union could not intelligently respond to the Company's job classification proposal, until it received and had an opportunity to evaluate the Company's wage proposal. Whether or not the proposed classifications made the Company's task any easier, it is evident that the proposal was not designed to facilitate negotiations over wages.

On holidays, the Company sounded a familiar theme, by proposing terms which were inferior to those under current company policy. Under the existing policy, as set forth in the employee handbook, regular full-time employees, on completion of 1 month's employment, were entitled to six paid holidays and 3 paid personal days, and a fourth personal day after 3 months' employment. Regular part-time employees were eligible to receive bonus pay, based on earnings, in lieu of paid holidays. Holidays, like vacations, were scheduled by arrangement and approval.

The Company proposed that regular full-time unit employees, on completion of probationary period (66 working days) would be entitled to six paid holidays. They would earn 3 personal days at the rate of one per year, to a maximum of three personal days. Regular part-time employees would not receive any holiday benefits. The Company also proposed (as with vacations) strict standards for taking personal holidays, including a requirement that the employee obtain a qualified replacement for a weekend personal day.

The Company proposed no pertinent improvements in holiday benefits, and gave no explanation or justification for reducing or eliminating such benefits. I find that the Company's proposal on holidays was not made in good faith.

On grievance-arbitration, the Company presented an incomplete proposal. The Company proposed to define a grievance as a disagreement between the Company and an employee concerning interpretation or application of or compliance with the contract, subject to the management-rights article of the contract, and other limitations contained in the contract. The Company proposed a four-step grievance procedure, with arbitration as the fourth step, However, the Company did not at this time, submit any language covering the arbitration process.

On management rights, the Union counterproposed a more restricted article than that proposed by the Company. The Union proposed that suspension and discharge be for ''just cause,'' and that subcontracting be excluded. On disabilities, the Union proposed that company actions could not violate the rights of other employees, and that company actions would be subject to grievance-arbitration. The Union proposed to delete the broad interpretation language.

On sick days, the Union counterproposed sick leave for regular full-time and part-time employees, accumulation of sick days up to 180 days, and deletion of the 3-day minimum.

The parties did not reach agreement on any contract provisions at the June 19 session. The parties next met in their sixth and seventh sessions, on June 25 and 26.

At the June 25 session, the Company presented proposals on subcontracting, jury duty, bereavement leave, dental insurance, and pension. The Union presented counterproposals on management rights, pension, and holidays. Although the record does not contain a complete company proposal for grievance-arbitration for June 25, the evidence indicates that the Company submitted such proposal on that date.

On subcontracting, the Company proposed that it would reserve the right to subcontract work performed by unit employees, and the Union would waive any right to bargain over company decisions to subcontract such work, or the effects of such decisions. However, the Company would endeavor to provide work for bargaining unit employees, subject to cost and other considerations. Felici testified that this proposal was a response to the Union's counterproposal to exclude subcontracting from management rights. However, the Company's proposal did not, in substance, change the Company's initial proposal to include subcontracting under management rights. The parties discussed subcontracting at the June 26 session, but did not reach agreement.

On jury duty, the Company proposed compensation for regular full-time employees, as provided under current company policy, but with added restrictions. The employee would be required to give immediate notice upon being summoned, obtain company approval, and call in for work if jury duty was completed during the employee's shift. The Company agreed to delete the requirement for approval, and the parties signed off on the Company's jury duty article as so modified.

On bereavement leave, the Company's proposal tracked current company policy. The parties signed off on the Company's proposal.

On dental insurance, the Company proposed to continue coverage under its current plan for regular full-time employees. However, the Company would reserve the right to unilaterally adjust copayment amounts after June 30, 1993. There was no agreement at this time.

On pension, the Company proposed continued coverage under its retirement plan. However, the Company would reserve the right to unilaterally change the plan, and the Union would waive any right to bargain over the change or its effects. The Union counterproposed to accept the Company's proposal, with the proviso that if the Company terminated the plan during contract term, the Company would, on request, negotiate with the Union concerning a plan. There was no agreement.

On grievance-arbitration, the Company presented its proposals concerning arbitration. The Company proposed, in sum, to reserve the right to appeal the arbitrator's decision, i.e., arbitration would not be final and binding. The arbitrator could not alter discipline if the arbitrator found that the alleged act or omission involving the grievant occurred, and could not substitute his judgment for the Company's business judgment. Muller testified that nothing was said about costs of arbitration. However, his notes indicate that at the June 26 session, arbitration was a sticking point, and that the Company proposed to drop ''loser pays'' if the Union agreed that the arbitrator could not modify discipline. I find that this occurred, and that the Company initially proposed that the loser would pay the costs of arbitration.

On June 26, the Union presented a counterproposal on grievance-arbitration. The Union revised language from its initial proposal, including a narrowed definition of a grievance. However, the principle elements of the Union's proposal, including those on which the parties differed, remained intact. Grievable matters would include discharge and suspension, which would begin at 2. Arbitration would be final and binding, the arbitrator could alter discipline, and the parties would share arbitration costs. There was no agreement on grievance-arbitration.

On sick days, the Union proposed to modify its June 19 counterproposal to exclude part-time employees. The parties agreed on language concerning calculation of sick pay, and employees receiving workers' compensation benefits.

The June 25 session was lengthy, but the sessions of June 25 and 26 resulted in only a few minor agreements. On June 26, the Company restated its categorical opposition to union security and dues checkoff, asserting again that these were matters of employee choice. Uniatowski said that the employees would not ratify a contract which did not include union security and checkoff.

C. *Alleged Unilateral Denial of Wage Increase to Unit Employees, and the Second Phase of Negotiations (July 8 through November 9)*

By letter dated June 25, Company President Pepper informed the hospital employees that they would receive a 4.5-percent wage increase, effective June 29, but that the increase would not apply to ''employees involved in collective bargaining.'' The parties stipulated that in July 1992, the Company gave all its employees, except the unit employees, an across-the-board wage increase of 4.5 percent.

Company Assistant Director of Human Resources Felici testified that he told the Union about the wage increase at either the June 25 or July 8 bargaining session. Muller testified that he learned of the increase sometime after it was granted, but before the July 8 session. In light of their testimony, it is evident that the Union did not receive notice of the increase prior to Pepper's announcement to the employees, and possibly not prior to the effective date of the increase.

Felici and Guardiani testified in sum that when they told the Union that nonunit employees would receive the increase, the Union did not object. However, the question of whether nonunit employees received an increase was not a matter of concern to the Union. The Company did not ask the Union whether it objected to unit employees either receiving, or not receiving, the across-the-board increase. As will be discussed, the Company was equivocal about this matter when it presented its wage proposal at the July 8 session.

Company Assistant Human Resources Director Felici and Company Human Resources Director Bramble testified in sum as follows: In April 1992, the Company conducted its annual study of area wage surveys. On the basis of that study, the Company prepared a plan which proposed to give a 4.5-percent across-the-board wage increase to all nonbargaining unit employees. On June 16, the Company's board of trustees approved the plan.

I do not credit the testimony of Felici and Bramble that the Company decided in 1992 to grant an across-the-board wage increase. In light of the Company's December 3, 1991 letter to the Union, I find that as of 1992, the Company had an established policy of annually granting such increase, leaving open only a determination as to the amount. If the

Company did not have such a policy, then the December 3, 1991 letter constituted a misrepresentation as to company policy.

At the July 8 bargaining session, the Company presented its wage proposal, although it had not yet presented all of its noneconomic proposals. The wage proposal may fairly be described as a masterpiece of obfuscation.

The Company proposed, in sum, starting rates for each of the job classifications under its June 19 proposal, based on annual progression over a 4-year period. The proposal purported to factor a 4.5-percent increase into the rates. The Company further proposed that unit employees presently earning above the maximum of the described scales would not be eligible for an increase. The Company also proposed that progression through the established rate range would be subject to a successful annual appraisal by the employee's supervisor. The appraisal would not be subject to grievance-arbitration. Management would set rates for new employees, within the pertinent job classification range, based on their skills and years of experience.

As indicated by the above-described provisions, the Company's proposal would vest in the Company broad and unreviewable discretion in establishing wage rates for both new and current employees. Also as indicated, the proposal referred to ''starting'' rates. However, the text of the Company's proposal tends to indicate that these were actually maximum rates. The Company's proposal was silent as to whether employees currently making more than their appropriate rate under the proposal would be red circled, i.e., frozen. Felici testified that Company Chief Negotiator King said that they would be red circled. Muller testified that he did not recall such a statement. I credit Felici, in that at some point, King probably expressed such an opinion. However, in the absence of any such provision in the Company's proposal, and in light of the Union's subsequent (October 30) proposal for red-circling, I find that the parties did not have an understanding in this regard.

A comparison of existing unit wage scales (effective July 1, 1991) with the Company's proposal indicates that the Company was generally proposing lower wage scales. As discussed, Felici testified that he could not tell from the Company's proposal, whether unit employees were currently making more, less, or the same as that provided in the Company's proposal. That would depend on their present step. Felici testified that it was his understanding that 15 employees, comprising about three-fourths of the unit, were currently making more than the rates proposed for them by the Company. The remaining employees might be eligible for wage increases, although, under the Company's proposal, this would be subject to company discretion.

As discussed in connection with shift differential, the Company presented conflicting testimony concerning the basis for its wage proposal. Felici testified that the proposal was based on area wage surveys. Guardiani testified that he based the proposal on his knowledge of wages at Pottstown Hospital. Felici and Bramble conceded, in sum, that some categories of employees were paid more than prevailing area wage rates. Bramble testified, in sum, that although the Company annually reviews area wage rates, the Company to his knowledge has never reduced employee pay, but has sometimes increased wage rates. The Company never asserted that its wage, benefits, or other proposals were based on the Company's economic circumstances.

The Company's assertion, or implication, that a 4.5-percent general increase was included in its wage proposal, was plainly a sham. A wage increase means just that, namely, an actual increase in pay. Indeed, Bramble conceded as much. Bramble testified that after the Company lowered the pay scale for its cooks, the affected cooks were red circled, and in addition, received a 1-percent bonus, which the Company gave in 1993 in lieu of an across-the-board general increase.

The Union's wage proposal had been on the table since the first bargaining session on March 17. The Company's wage proposal was so complex and confusing that the Union could not intelligently evaluate or respond to that proposal without reviewing the records, including step, length of service, qualifications, and performance record of each unit employee. Therefore, it is not surprising that the Union did not submit a second wage proposal until it presented its second comprehensive contract proposal on October 30.

At the July 8 session, the Company also presented its initial proposals on job stewards and initial employment (probationary) period.

On job stewards, the Company proposed, in sum, that stewards would not be compensated for time spent on steward functions. The Company explained that it had a ''philosophical problem'' with paying stewards to investigate and process grievances. The Company also proposed tight restrictions on steward movement and activity. The steward would be required to fill out a special timesheet for steward activity, obtain permission from his supervisor to engage in steward activity or leave his department to engage in such activity, obtain permission from the head of another department (if he wished to enter that department on steward business), and explain the purpose of his business, and report back to his supervisor on completion of steward business. Steward business was defined as ''processing grievances,'' and nothing else. The Company also proposed that it have ''sole discretion'' to discipline stewards for violating the no-strike clause of the contract.

The Union protested that the Company's proposed restrictions on job stewards were ''onerous.'' The Company responded that the maintenance unit had a small staff, unit employees worked throughout the Hospital, and the Company needed accountability. The Company agreed to inclusion of a *Weingarten* clause (right to have steward present at disciplinary hearing) and definition of steward duties to include grievance investigation, dues collection, and transmission of union messages.

On initial employment period, the Company proposed, in sum, continuation of its present policy, with sole discretion in the Company to terminate, suspend, or discipline probationary employees. On grievance-arbitration, the Company proposed language which tightened the time limits on processing of grievances. The parties signed off on this language. On subcontracting, and holidays, the Company presented proposals which did not change its earlier proposals. The Union presented a counterproposal on subcontracting which substantially capitulated to the Company's position. The Union proposed, in sum, to accept the Company's proposal, with a proviso that before subcontracting work which would result in a layoff of unit employees, the Company would ''meet and discuss'' such subcontract with the Union, i.e.,

without any bargaining obligation. The parties tentatively so agreed, and signed off on subcontracting at the next session on July 22. On management rights, the Company proposed to permit adversely affected employees to invoke the grievance-arbitration procedure with respect to company actions under the Americans with Disabilities Act.

At the July 22 session, the Company complained that unit employees were violating the Company's no-solicitation policy by trying to organize employees on working time or in patient care areas. Union Secretary-Treasurer Lehman angrily replied that the Union was not interested in organizing nonunit employees, and questioned why the Company was unwilling to accept the Union's proposed boilerplate language. There was a prolonged argument which had a disruptive effect on the meeting.

The Company presented its initial proposals on leave of absence without pay or benefits, and visitation. The parties signed off on the former, and as indicated on subcontracting.

On visitation, as with job stewards, the Company proposed tight restrictions on union activity. Union visitation would be limited solely to handling of grievances, would require advance appointment and approval, and be limited from 8:30 a.m. to 5 p.m. Union representatives might be prohibited from any solicitation or distribution. The Union would be provided with one bulletin board, but notices would require company approval, be limited, in sum, to business notices, and could not contain anything political, controversial, or critical of the Company or any person. The proposal also included company restrictions on employee solicitation and distribution. As with stewards, the Union characterized the proposed article as ''onerous.''

On alteration of contract and waiver, the Company proposed a broad zipper clause, which would permit the Company to unilaterally eliminate *or change* past practices or local privileges. This was the third time, since the April 9 session, that the Company shifted away from its indicated agreement with the Union's concept, by proposing terms more favorable to the Company. Nevertheless, the Union capitulated, and the parties signed off on the Company's July 22 proposal.

On management rights, the Company presented a typed proposal which did not vary from the Company's previously stated position. The proposal incorporated by reference, the parties' agreement on subcontracting. The Union capitulated, and the parties signed off on the Company's proposal. As the article purported to give the Company unrestricted rights, among others, to suspend and discharge unit employees, it would appear that employees would not have the right to invoke any grievance procedure with respect to such action. The Union accepted this proposal, notwithstanding its prior assertion that the unit employees were principally concerned with job security and their need for a grievance-and-arbitration procedure.

On job stewards, the Company adhered to its previously stated positions, except to add additional language on disciplinary hearings, which would restrict participation of the steward at such hearings. There was no agreement. Muller's notes indicate that the only problem was pay for stewards.

On grievance-arbitration, the Company presented a proposal which did not materially vary from its previously stated positions. There was no agreement.

On no-strike no lockout, the Company adhered to its previously stated positions. The Union counterproposed to accept part of the Company's proposal, including definition of the job steward as a union agent, and Company right to invoke grievance and arbitration in the event of a violation.

At the 10th bargaining session, on July 23, the Company presented its proposal on union recognition, i.e., the article to define the unit about which the parties presumably had been negotiating for more than 4 months. The Company proposed to exclude from the unit, part-time employees who worked less than 32 hours per (2 weeks) pay period. As the only regular part-time employee in maintenance worked a 15-hour week, this would operate to exclude him from the unit. The Company also proposed a formula under which temporary, casual, seasonal, and student employees, to the extent that they numbered more than four, would be included in the unit. As indicated, the Board certified a unit which consisted of ''all full time and regular part time'' skilled maintenance and groundskeeping employees, ''excluding all other employees.'' Therefore, the Company was proposing to alter the certified unit.

On suspension and discharge, the Company proposed a clause which provided that disciplinary notices could remain in effect for 1 year. The Company did not present its proposed complete article at this time.

The Union accepted, and the parties signed off on, the Company's proposed articles on job classifications and initial employment. The parties discussed, but did not reach agreement on the Union's proposed primary strike-primary picket line exception to the no-strike clause.

The parties next met on August 25. On grievance-arbitration, the Company presented a proposal which did not change its previously stated positions, except that the Company proposed that the parties share the expenses of the arbitrator. Muller noted that the Company adhered to its position on company discretion (''In the opinion of the Hospital''). The Union agreed to the Company's proposal, and the parties signed off on grievance-arbitration.

On layoff and recall, the Company modified its proposal to apply to reductions-in-force of more than 14 days. As discussed, the proposal remained less favorable to the unit employees than current company policy. There was considerable discussion. The Union said they were unhappy about giving the Company everything, and would have to sell the grievance-arbitration proposal to the employees. Nevertheless, the Union agreed, and the parties signed off on this proposed article.

On visitation, the Company adhered to its previously stated positions, except to propose that stewards be compensated for scheduled time spent attending meetings called by the Company. The Union agreed to the Company's proposal, and the parties signed off on visitation.

The Company presented its complete proposal on suspension, discharge, and resignation. The Company proposed that: ''Discharge or suspension must be for just cause.'' However, the Company did not propose to include such language in the management-rights clause. The Company proposed to have discretion to retain disciplinary notices for more than 1 year (in place of its prior proposal that the Company and the Union could agree to such extension). The Union argued that in a grievance proceeding, the Company could present evidence of an employee's prior record, even with respect to

disciplinary notices which were no longer in effect. The Company rejected this argument. The Company agreed to the Union's proposal to insert examples of cases warranting extended retention of disciplinary notices, and to afford the Union the right to examine the employee's file in such cases. The Union agreed to the Company's proposal as so amended. On October 7, the parties signed off on suspension, discharge, and resignation.

At the next session on September 2, the parties signed off on the Company's dental insurance proposal. The Company also presented its proposal on health insurance, proposing, in sum, to continue in effect the Company's current plans. (The parties previously discussed health insurance at the June 25 session.) The plans provided for coverage for regular full-time employees, and company payment of one-half of the monthly premium for regular part-time employees working at least 32 hours per pay period. Therefore, the only regular part-time employee in the unit would not be entitled to coverage. Nevertheless, the Union agreed, and the parties signed off on the Company's proposal.

On holidays, the Company proposed, in sum, to tighten the requirements for a weekend holiday, by requiring that the employee give 4 weeks' advance notice. The employee handbook contained no such requirement. There was no agreement.

The Union presented a counterproposal on recognition. The Union proposed to include regular part-time employees working 31 to 80 hours per pay period. However, the present part-time employee (working a 15-hour week) would be red circled. The Union also proposed, in sum, to accept the Company's proposal on nonregular part-time employees, but with time limit on such status. The Union's counterproposal constituted significant movement toward the Company's proposal. However, there was no agreement.

The parties also discussed other unresolved issues, including union security, checkoff, overtime, and job steward language, without reaching agreement. Felici testified that the Company expected, but did not receive, union proposals on tools, replacement on call-outs, and days off.

At the close of the September 2 session, Union Counsel Muller and Union Vice President Uniatowski told Company Attorney King they were concerned about the pace of negotiations. They said the Union wanted negotiations completed by November 2, and would send a letter in this regard. By letter dated September 3, Muller informed King that the Union obtained International strike approval, and that he hoped a strike would not be necessary, but the Union was setting a November 2 deadline on negotiations. By letter dated September 15, King responded that the Company would continue to negotiate, and he hoped there would be no strike.

The parties next met on October 7. They signed off on nondiscrimination and military service articles. Both articles simply confirmed unit employee rights under law. The parties discussed some issues in dispute, without movement or agreement. The Union said they read the Company's wage proposal, but did not have an opportunity to review how the proposal would affect each unit employee. The Union said that if the Company had not changed its position on anything, there was nothing to discuss.

By letter dated October 22, Muller gave notice to the Company, pursuant to Section 10(g) of the Act, of the Union's intent to picket and strike the Company, effective as of November 2. Muller added that if negotiations were successfully concluded by that date, the notice would be withdrawn.

During the period of October 27 to 30, the Company placed newspaper advertisements for unit positions, i.e., for replacements in the event of a work stoppage. The advertisements indicated wage rates comparable to those currently paid by the Company, i.e., higher than those proposed by the Company in the negotiations. Felici testified that the Company received about 750 applications. None of the applicants were hired.

The parties next met on October 28. There was considerable discussion on no-strike no-lockout. The parties also discussed job steward pay, and in Felici's words, ''open shop.'' The Union inquired about posting of union notices. King reminded Muller that the parties signed off on visitation on August 25. The balance of the meeting was devoted principally to the prospect of a strike. The parties had previously agreed to a 48-hour waiting period before giving information to the media. The Company wanted to change this agreement, in view of the Union's strike notice.

The parties next met on October 30. This was Union Steward Donovan's last session. The Union began the session by presenting its second comprehensive contract proposal. The proposal included significant concessions in most major areas of dispute.

On wages, the Union proposed, in sum, to accept the Company's July 8 proposal, with certain modifications. Employees making above the maximum of their pay scale would be red circled. All unit employees, including those red circled, would receive a 4.5-percent wage increase, effective as of the date of the July 1992 general increase. The appraisal procedure would not be exempted from grievance-arbitration. Three unit employees (Hoxter, Ireson, and Phillips) would be placed in job classification I instead of classification II. The unit would retain the present shift differential.

On union security and checkoff, the Union adhered to its proposal for checkoff, coupled with an ''agency shop'' proposal. The Union proposed, in sum, that present union members would have to remain members during the contract term. The Union told the Company that all but one of the unit employees were union members. Muller testified that he considered this proposal to provide for a modified union shop, and that the Union submitted the proposal in response to the Company's position that it did not want to force anyone to join the Union.

On pensions, holidays, and recognition, the Union stood by its counterproposals, respectively, of June 25, June 25, and September 2. However, the record does not reflect any prior union counterproposal on holidays. On sick days, the Union proposed acceptance of its June 25 counterproposal, including the agreed-on language on calculation of sick pay and employees receiving workers' compensation benefits.

On overtime, the Union proposed to accept the Company's June 19 proposal (actually presented on May 27), with the qualification that overtime calculation would conform to any changes in the employee handbook. Muller testified that he made this proposal in response to the Company's assertion that they were in the process of revising the handbook.

On vacations, the Union proposed, in sum, to accept the Company's proposal, provided that the Company agreed to

give vacation benefits to part-time employees in accordance with the employee handbook, and delete the requirement that employees obtain a replacement for weekend vacation days.

On seniority, the Union proposed, in sum: (1) seniority rights for both full-time and part-time employees; (2) the Union's proposal that opportunities and security would increase with seniority, but ''unless modified or covered by another (contract) provision,'' (3) the Union's proposed language on break in seniority, with modification as to layoffs (8 months rather than 3 years, as the cutoff), and (4) the Union's proposed language on seniority rank and posting.

On job stewards, the Union proposed to accept the Company's July 22 proposal, with a broadened definition of disciplinary hearings at which a steward could be present. On no-strike no-lockout, the Union proposed to accept the Company's July 22 proposal, without qualification.

The Union further proposed, in sum, to resolve other matters on the basis of the prior signoffs. The Union proposed a 1-year contract (October 30, 1992, to October 31, 1993). The Union also raised the matter of tools. However, the Union's position in this regard constituted more of an inquiry rather than a contract proposal. The Union questioned the Company concerning its policy, asserting the Union's view that if personal tools were required, the Company should pay for them, but if the tools were personal property, the employees should be permitted to take them home. The Union stated that its comprehensive contract proposal was not a final offer.

In sum, the Union proposed to make major concessions in an effort to reach a contract, including acceptance of terms and conditions less favorable than those afforded to nonunit employees. The Union proposed to accept reduced wage scales for unit employees, with no pay increase other than the 4.5-percent across-the-board increase. The Union proposed to accept such bitter pills as no compensation for stewards on union business, and tight restrictions on their activities, no primary strike-primary picket line exception to the no-strike article, and a largely symbolic seniority article.

The parties tentatively agreed on job stewards and no-strike language (as indicated, the Union proposed to substantially or totally accept the Company's proposals on these matters).

The parties engaged in considerable discussion over the Union's ''agency shop'' proposal. Felici testified, in sum, that he did not understand the proposal. According to Felici, he could not tell the difference between the Union's proposal and a ''closed shop.'' Felici testified that he understood a closed shop as one in which new hires would become union members.

Felici's assertions are incredible. The Company's chief negotiator was also its counsel. As anyone with a modicum of knowledge of labor law would promptly recognize, the Union, although mislabeling its proposal, was in substance proposing a maintenance-of-membership clause. Indeed, Felici indicated in his notes that he clearly understood what the Union was proposing. It is evident that the Company's professed confusion was simply filibustering.

Felici and Guardiani, in their testimony, also professed inability to understand the Union's wage proposal. However, almost in the same breath, they indicated that they did understand the proposal, specifically, that the Union was proposing to accept the Company's proposed wage scales, with employees above the maximum for their scale being red circled, coupled with a 4.5-percent wage increase.

The parties reviewed the Union's proposals. The Company was generally noncommittal, although at one point indicating they wanted a contract of more than 1 year's duration. King said he would take the Union's comprehensive proposal to the Company. He added that he thought the Union made good movement, and the parties were close to the area where they could reach agreement.

By the end of the meeting, Muller was under the impression that the Company was pleased with the Union's proposals. In light of King's statement, the Union announced that it was withdrawing its notice of intent to strike. The parties agreed to meet next on November 9.

At the November 9 session, the Company delivered a rude shock to the Union. The Company presented, for the first time, a contract proposal on CQI, a second proposal on pensions, and third a proposal on vacations.

On CQI, the Company proposed in sum that unit employees would be required to participate in the program, subject to the Company's determination; the job steward could not serve as a team (QIT) leader; the Company would oversee the program; the team could discuss terms and conditions of employment, but not change the contract; and the CQI program would not be subject to the grievance procedure.

On pensions and vacations, the Company submitted proposals which did not materially change its previously stated positions. The Company adhered to its positions that the Union waive any rights to bargain over changes in or termination of the pension plan, or the effects of such changes or termination. On vacations, the Company adhered to its position that employees requesting weekend vacation obtain a qualified replacement (if possible).

During the meeting, the Company offered to agree to bargaining over a successor pension plan, if the Union accepted the Company's proposal on overtime. The Company also offered to agree to a 4-percent vacation bonus for regular part-time employees (as provided in the employee manual) if the Union agreed to the 4-day minimum for paid sick days.

The Union presented another comprehensive contract proposal. The Union stood by its October 30 proposals on most issues, but made further concessions in some areas. On vacations, the Union proposed to accept the Company's requirements for weekend vacation days, provided that unit part-time employees received the same vacation benefits as nonunit part-time employees. On holidays, the Union proposed, in sum, to accept the Company's proposal (with restrictions on use and no benefits for part-time employees) provided that full-time unit employees received the same personal day benefits as nonunit employees (under the employee handbook). On sick days, the Union proposed, in sum, to accept the Company's proposal, as modified and agreed, but without the 4-day minimum. On recognition, the Union proposed a modification to its September 2 counterproposal. The parties could agree to extension of initial employment of nonregular employees, and neither party would unreasonably withhold consent. With respect to tools, the Union stated that it was willing to work out an ''equitable solution.'' The Union rejected the Company's CQI proposal with an emphatic ''[NO].''

There was no further movement from either side. The Company's rejection of any form of union security or check-

off, coupled with its CQI proposal, and evident preparations for a strike, prompted angry outbursts from the union side. Secretary-Treasurer Lehman asserted that the Union would be working for nothing if there were an open shop. He asked how the Company would like it if the Union bussed indigent patients from Philadelphia and Chester to the Hospital's doorstep. He told the Company to ''take your CQI and shove it.'' He said he was tired of accusations against the Union. One union representative suggested that the Union could pull up a big trailer with a union logo in front of the Hospital.

Muller, the Union's chief negotiator, took a moderate tone. He asserted that the Union was not in the business of striking, but just wanted an agreement. He said that stewards should be team (QIT) leaders.

Muller asked Company Attorney King why the Company would not agree to ''me too'' on overtime, vacation, and sick days, i.e., the same terms and conditions enjoyed by nonunit employees. King responded that the Company had given more in some areas than was enjoyed by nonunit employees, and that the Company's policy on overtime was wrong and probably would change. King added that if the Company wanted to hurt the Union, they could have made other proposals.

King's explanation for the Company's position was palpably false. The Company never revised its overtime policy, or otherwise reduced wages or benefits as set forth in the employee handbook. In a letter to all employees, dated November 24, Company President Pepper declared unequivocally and emphatically: ''*We do not have plans to change any benefit in our handbook unless it is a change that benefits you*'' (emphasis in original). Meanwhile, in the negotiations, the Company was steadfastly proposing reduced wage rates and reduced rates or benefits with respect to shift differential, overtime, sick days, vacations, and holidays. The Company also steadfastly proposed more stringent standards for such benefits and other benefits (jury duty). In no area of wages, hours, and benefits, did the Company offer or agree to any term or condition which was even slightly superior to those in effect under current company policy.

With respect to nonmonetary matters, e.g., job security and union representation, the Company steadfastly adhered to proposals which would deprive the unit employees of rights which they would have enjoyed in the absence of any contract. The Union would have no right to bargain, or the employees to utilize the grievance procedure, in such critical areas as subcontracting, suspension, and discharge and wage rate progression. The unit employees would have no right to refuse to cross a primary picket line. In light of the Company's proposed broad management-rights article and other provisions relating to management discretion, the grievance-arbitration procedure would be largely devoid of any substantive significance. These matters will be further discussed at a later point in this decision. In view of the foregoing factors, and my previously discussed findings with respect to the Company's proposals on shift differential, sick days, vacations, and holidays, I find that the Company's proposals, including overtime, insofar as they offered lesser benefits or stricter standards than those currently in effect under company policy, were not made in good faith.

With regard to the Company's CQI proposal, the Company offered varying explanations. Felici testified that the Company decided to formulate and present the proposal, based on the parties' discussion of the *Du Pont* case at the May 27 session. Felici added that the Company wanted maximum participation. Guardiani testified that the Company was concerned because the unit was the only department not participating in the CQI program, and was also concerned because the Union filed an unfair labor practice charge alleging that the Company engaged in direct dealing with employees concerning tool policy.

The Company's explanations do not withstand scrutiny. By May 28, the parties had reached an understanding that the CQI program was voluntary, that the program was not a subject for contract negotiation, and that the union steward could be (and was in fact chosen as) team leader. At no time prior to November 9 did the Company indicate any change in this position, or even indicate that it was considering such change.

The Company's November 9 proposal constituted a violation of the parties' understandings. By May 28, the Company already knew that the unit employees had dropped out of the CQI program, and that Union Steward Donovan had raised a question about the legality of the program. If the Company were acting in good faith, it would make no sense for the Company to wait more than 5 months, and then, without warning, spring this proposal on the Union. Moreover, even if the Union accepted this proposal, such agreement would not preclude any employee from filing an unfair labor practice charge, alleging that the program was unlawful, under *Du Pont*, with respect to nonunit employees.

Moreover, the Company offered no explanation for its proposal that the job steward could not serve as team leader. That proposal, particularly when considered in the context of the Company's reference to the unfair labor practice charge, tends to indicate that the proposal was designed as punitive and humiliating to the Union.

By the time the parties adjourned on October 30, the Union had made major concessions. By reason of such concessions, the parties appeared to be moving toward a contract. The Company's CQI proposal marked a turning away from such agreement, and the Company was well aware of this fact. The Company was well aware, from the parties' prior discussions and prior events, that the Union could not accept such proposal, or seriously consider it, and still maintain the respect of the unit employees.

I find that the Company presented its CQI proposal in order to thwart the prospect that the November 9 session might result in further union concessions or other discussions which could result in agreement on a contract. I find that the proposal was not made in good faith, and may properly be considered as evidence that the Company was negotiating without intent to reach agreement.

The November 9 meeting ended, in Felici's words, ''negatively.'' Muller testified that he was disappointed at the lack of company reciprocation. When Muller asked how the initial employment article fit in with the Company's proposal on seniority (i.e., no seniority for part-time employees), King answered brusquely that ''it didn't.'' The Federal mediator said he would schedule the next meeting. He did not do so.

The parties next met on March 29, 1993, under circumstances which will be discussed.[3]

D. *Alleged Evidence of Company Animus Toward the Union, and Alleged Unlawful Surveillance of Employee Union Activity*

Theresa Leo was in charge of the Company's food service department from about 1989 until December 1993. She conducted periodic meetings of department supervisory personnel. Leo testified that the meetings were designed to ''keep the supervisors informed so we're all doing the same thing, for consistency, really.''

Leo conducted one such meeting on July 29, 1992. Assistant Department Director Bonnie McLaughlin took minutes of the meeting. Copies of the minutes were distributed to all supervisory personnel. Leo kept a copy of the minutes in the department file.

Item 17 of the minutes stated as follows:

> 17—Unions—Educate staff on unions. We are permitted to give examples, opinions. (i.e. ''I wouldn't join a union because of dues and someone else speaks for you regarding policies and procedures'') We (mgr/supv) are *not* to acknowledge union cards or officers. If a union representative (outside CCH) approaches, contact Human Res. or Security.
>
> Let staff know why you wouldn't sign a card—they are legally binding from day signed & rights are forfeited at that time.

Item 17 continued on the next page, as follows:

> Unions (cont)
>
> Please keep an eye on our staff during working time if the[y] are speaking with Maint. for [more than] 5 min—this is a Quantity of Work issue. Maint can only speak to them on break time or when off the clock.

The Company stipulated that the minutes were accurate. Leo, who was presented as a company witness, testified that the Company did not have a formal 5-minute rule, she felt that any conversation of more than 5 minutes was not a business conversation, she gave maintenance as an example, which could have applied to any conversation, and her remarks concerned quantity of work, and were not related to the Union. However, this would not explain why her remarks were placed under the topic heading of ''Unions.'' Moreover, the minutes indicated that Leo referred only to conversations with maintenance employees. The minutes also indicated that Leo instructed that maintenance employees could speak to food service employees only on breaks or when off the clock, although the Company had no general rule prohibiting conversations between employees during companytime.

In light of Leo's testimony concerning the purpose of departmental supervisory meetings, I find that Leo's remarks reflected company policy. I find that Leo's remarks reflected a company policy and intent to isolate the maintenance employees in order to prevent the spread of unionization. The Company recognized that the food service department employees, in particular, were potentially receptive to unionization. I further find that Leo's remarks at the meeting may properly be considered as evidence of the Company's overriding determination to prevent the spread of unionization at the Hospital, and that this goal governed its course of conduct in the unit negotiations.

The complaint alleges that on or about November 24, 1992, the Company by its security director, Kenneth Sensening, and by Assistant Director of Human Resources Felici, outside the Hospital, engaged in surveillance of its employees' union activities, by taking photographs and videotapes of those activities.

Felici and Guardiani testified in sum as follows: In September, when the Company heard rumors of a strike, the Company implemented contingency plans. Among other actions, the Company drew a yellow line around, but about 20 feet within, its actual unmarked property line. The Company did not at any time post signs prohibiting trespassing on its premises. The hospital premises are open to the public, and persons routinely enter its premises without being checked. The Company does not care if the general public comes onto its premises. The Company has previously asked solicitors to leave its premises, but never photographed them. The Company has a no-solicitation policy. However, the only such stated policy (contained in the employee handbook) purports to restrict only solicitation by employees. The Company's premises, including a portion within the yellow line, contains a public easement (Marshall Street). Therefore, vehicles proceeding on Marshall Street travel on company premises. The purpose of the yellow line was to enable a court to determine the propriety of an order enjoining the Union from trespass picketing.

On November 24, Union Officials Muller, Lehman, and Uniatowski, accompanied by nonemployee union members, went to the hospital area for the purpose of distributing union literature. There were a total of 16 or 17 handbillers (not all at the same time). They posted themselves at three or four entrances to the hospital premises. The hospital premises occupy more than 50 acres. In the morning, and again in the afternoon, they distributed, or attempted to distribute handbills to occupants of vehicles entering or leaving the premises. Typically, there were four or fewer handbillers at each entrance. The handbills were addressed to the Company's employees. The handbills asserted, in sum, that the Company was cutting union employees, including not giving union employees a pay increase that other employees received, in order to keep other employees from joining the Union. They urged the employees to ''join us.''

The Union did not give the Company advance notice of the handbilling. Muller testified that the union officials believed that the yellow line marked a property line, and therefore instructed the handbillers not to cross the line. The handbillers usually, but not always, remained outside the line. On some occasions, they crossed over the line inadvertently, or in the course of distributing or attempting to distribute the handbills. A videotape taken by Company Security Director Sensening, indicates that at one entrance, the handbillers might have blocked the view of exiting drivers if they remained outside the yellow line.

Muller testified that none of the handbillers blocked ingress or egress to the hospital premises. Felici, who was

[3] At the November 9 session, the Company complained that the Union had not paid its share of the negotiation expenses. This matter will be discussed at a later point in this decision.

present, testified that the handbillers sometimes blocked entrances. Muller testified that the handbillers moved only in response to vehicles, and did not engage in patrolling. No witness testified that the handbillers engaged in patrolling. Felici testified that in his opinion, the handbillers were not picketing.

It is undisputed that Felici and Sensening videotaped and photographed still pictures of the handbillers, handbilling, and attempted handbilling. Videotaping and photograping of handbilling included, in some instances, vehicles and their occupants.

Felici testified in sum as follows: At 6 a.m. on November 24, Sensening informed him of the handbilling. Felici went to the hospital premises. Although Sensening was videotaping and photographing the handbillers and handbilling, company President Pepper, Company Attorney King, and company chief operating officer Prisitis instructed him to do likewise. They told him to do so because the Company needed physical evidence of illegal activity, including trespassing. Felici had never previously operated a video camera, and admittedly, ''was not an accomplished user of one of those.'' Although he sometimes videotaped the handbilling, there were significant periods of time when he held the camera to his eye without pressing the ''on'' button, i.e., when he knowingly pretended to be filming when not actually doing so.

Assistant Vice President Guardiani testified that the Company treated the Union in the same way as any other soliciting organization. However, the Company never told the union handbillers that they were trespassing, or asked them to leave. As indicated, the Company never previously photographed solicitors, whether or not they were on hospital premises. Guardiani's assertions were patently inconsistent, and at least in part, incredible.

On the same day as the handbilling, Company President Pepper issued a letter to the Company's employees. Pepper stated the Company's position on the negotiations and union organization. Pepper cautioned the employees that they should not sign union cards unless they were comfortable with what it meant for their future. Pepper added that the employees should know that union cards ''can be considered public information.'' This was the same letter in which Pepper assured the employees that the Company did not intend to reduce their benefits.

I do not credit the Company's explanation for the conduct of Felici and Sensening in photographing and videotaping the handbillers and handbilling, and in pretending to do so. As indicated, Felici testified that they acted pursuant to legal advice, in order to provide evidence of illegal activity, including trespassing. It is axiomatic that in order to establish a case of trespass, an attorney in such circumstances would advise his client to inform the alleged offenders that they were trespassing, and request them to leave the premises. See 18 Pa. C.S. Sec. 3503. Nevertheless, although the Company contends that the union handbillers distributed literature on hospital premises, the Company never took such action. Company Officials Guardiani and Bramble testified, in sum, that company security personnel have previously requested solicitors to leave the hospital premises. The Company's failure to do so in the present situation was inconsistent with its purported concern to build a case against illegal union activity.

If the Company sought to obtain physical evidence of illegal activity, in order to make a case against the Union, it is unlikely that the Company would assign that task to a person who had no prior experience in operating a video camera. It would also make no sense, and serve no useful purpose, if that person, for significant periods of time, pretended to videotape the handbilling without actually doing so. However, if the Company sought to intimidate its employees, and discourage them from taking union literature or otherwise making contact with the Union, then it would make sense to assign that task to a high-ranking personnel official like Felici, regardless of his lack of qualifications as a photographer. It would also make sense, for that purpose, for Felici to pretend to videotape the handbilling without actually doing so.

As discussed, the Company determined to prevent further unionization among its employees, and toward that end, to discourage its unorganized employees from contact with the Union and the unit employees. I find that this was the Company's motive in photographing and videotaping the handbillers and handbilling on November 24, and in pretending to engage in such conduct.

This is not a case in which an employer, in an inconspicuous manner, simply and passively observes open union activity. Rather, the Company, in a conspicuous manner, engaged in conduct which predictably tended, and was in fact designed, to intimidate its employees and thereby discourage them from receiving union literature. Therefore, the Company violated Section 8(a)(1) of the Act by engaging in surveillance of employee union activity. *New Process Co*., 290 NLRB 704, 717 (1988), enfd. mem. 872 F.2d 413 (3d Cir. 1989). The Company further violated Section 8(a)(1) in creating the impression of surveillance of union activity by photographing and videotaping the handbilling, and in particular, by pretending to engage in such conduct.

As the Company's motivation for its conduct was unlawful, it is immaterial whether the union handbillers, at times, entered onto company property, temporarily blocked entrances, or otherwise engaged in unprotected conduct. *Dayton Hudson Corp*., 316 NLRB 85 (1995). The employees who were entering or leaving the Company's premises had a statutorily protected right, if they wished, to accept union literature. The Company, by its conduct, interfered with, restrained, and coerced its employees in the exercise of that right.

If necessary to determine whether the Union engaged in unprotected activity, I would find, first, that the Union did not violate the notice provision of Section 8(g) of the Act. Section 8(g) requires, in sum, that a labor organization give a 10-day notice ''before engaging in any strike, picketing, *or other concerted refusal to work* at any health care institution'' (emphasis added). Here, the Union did not engage in or induce any employees to engage in a work stoppage, and there were in fact no work stoppages. The Union did not even engage in picketing. Rather, the Union engaged in publicity other than picketing, by distributing and attempting to distribute handbills to the Company's employees. See *NLRB v. Servette, Inc*., 377 U.S. 46 (1964).

I further find that the Union's handbilling was substantially, if not totally protected conduct under the Act. The Company failed to establish that the Union engaged in ''trespassing.'' As indicated, the company's premises were generally open to the public, the alleged company premises in-

cluded a public right of way, and the Company never told the handbillers that they were trespassing, or requested them to leave the premises. Evidence of temporary blocking of entrances was at best isolated and inconclusive. Moreover, most of the photographing and videotaping was directed at clearly protected union activity, i.e., handbillers or handbilling outside of the yellow line, which did not involve any arguable blocking. Most significantly, as discussed, the employees were engaged in statutorily protected activity.

E. *Concluding Findings with Respect to the Alleged Failure to Provide the Unit Employees with the July 1992 General Wage Increase*

I find without merit the Company's affirmative contention that the Union's charge with respect to this allegation was not timely filed. The Union's first amended charge, filed on November 30, 1992, alleged that the Company violated Section 8(a)(1), (3), and (5) of the Act, in part, by discriminating against bargaining unit employees in terms of wages and working conditions. That charge encompassed the present allegation. Therefore, the present charge was timely filed.

Addressing the merits, I find that the Company violated Section 8(a)(1) and (5) of the Act by unilaterally failing and refusing to grant the unit employees the July 1992 general 4.5-percent wage increase. The Company's December 3, 1991 letter speaks for itself. As discussed, the Company unequivocally informed the Union that it had an established policy of granting an annual across-the-board increase to all its employees. The Union promptly responded, in sum, that it anticipated the Company would continue that practice until a contract was reached. Nevertheless the Company, without any advance notice to the Union, or affording the Union an opportunity to bargain over the matter, proceeded to announce to its employees, and then implement, a 4.5-percent general wage increase, excluding the unit employees.

The Company thereby violated Section 8(a)(1) and (5). ''An employer has a duty not to change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union.'' *Rocky Mountain Hospital*, 289 NLRB 1347 (1988), citing *NLRB v. Katz*, 369 U.S. 736, 745–747 (1962); see also *Central Maine Morning Sentinel*, 295 NLRB 376 (1989). In particular, ''an employer that has a practice of granting merit raises that are fixed as to timing but discretionary as to amount may not discontinue that practice without bargaining to agreement or impasse with the union.'' *Lamonts Apparel*, 317 NLRB 286 (1995), citing *Daily News of Los Angeles*, 315 NLRB 1236 (1994). Here, the Company compounded its violation by failing even to give the Union advance notice of its action. *Talsol Corp*., 317 NLRB 290 (1995); *Century Wine & Spirits*, 304 NLRB 338, 347 (1991).

This is not a case such as *Postal Service*, 261 NLRB 505 (1982), relied on by the Company, which involved wage increases ''randomly given'' at ''irregular intervals.'' The Company's reliance on *Winn-Dixie Raleigh, Inc*., 267 NLRB 231, 235 (1983), is also misplaced. In *Winn-Dixie*, the employer gave advance notice of its intentions, the parties were engaged in intensive negotiations over wages, the increases granted by the employer varied among job classifications, and the employer and union could not agree as to the amount of increase which would be applicable to the unit employees. In these circumstances, the Board held that the employer did not act unlawfully in failing to give an increase to the bargaining unit employees. In the present case, the Company and the Union had an express understanding that the unit employees would receive the same general increase as that given to all other employees, the Company violated that understanding, the Company gave no advance notice to the Union of its action, and the Company announced and implemented the increase before presenting its wage proposal, and before the parties had even began negotiations over wages.

I further find that the Union did not, through the subsequent negotiations over wages, waive its right to object to the Company's unilateral failure to grant the 4.5-percent wage increase to the unit employees. As the Company failed to afford the Union prior notice and an opportunity to negotiate the matter, the Union, as of the July 8 bargaining session (when the Company initially presented its wage proposal), was presented with a fait accompli. *Century Wine*, supra. Moreover, the Company clouded the issue by taking the position that a 4.5-percent wage increase was incorporated into its wage proposal. In these circumstances, the Union did not clearly and unmistakably waive its right to object to the Company's unilateral failure and refusal to grant the unit employees an actual, not fictional, 4.5-percent wage increase. Indeed, the Union, through its October 30 and November 9 proposals, maintained its position that the unit employees were entitled to the 4.5-percent general wage increase, retroactive to July 1992.

I further find that the Company's course of conduct with respect to this matter may properly be considered as evidence of an overall failure and refusal to bargain in good faith with the Union. See *Rocky Mountain Hospital*, supra at 1348. In this regard, I find particularly significant, the Company's actions in violating its understanding with the Union, misleading the Union, and failing to inform the Union of its intentions.

F. *Tentative Concluding Findings with Respect to the Company's Alleged Overall Failure and Refusal to Bargain in Good Faith with the Union*

The complaint alleges in sum that the Company and the Union met in negotiations at various times from March through November 1992, and that during this period the Company made harsh and regressive proposals. The complaint further alleges that by its overall conduct, including the Company's unilateral exclusion of the unit employees from the general wage increase, the Company failed and refused to bargain in good faith with the Union.

As indicated, the complaint focuses on the negotiations during the period from March through November 1992. When the parties adjourned on November 9, no further meetings were scheduled, and there was no indication of further movement from either the company or the union side. The Federal mediator, who said he would schedule the next meeting, never did so. The Union sought recourse through other means. On November 23, the Union filed its initial unfair labor practice charge, followed by amended charges. On November 24, as discussed, the Union sought, through handbilling, to enlist support from the Company's unorganized employees. Thereafter, the Union sought to use its charges as a lever to resume negotiations. By letter dated February 25, 1993 (which will be discussed), the Union proposed, in sum, to withdraw its charges in exchange for con-

cessions by the Company, including acceptance of the Union's November 9 contract proposal. On March 29, 1993, the parties resumed negotiations.

If there was good-faith bargaining between the parties during the negotiations from March through November 1992, then as of November 9, the parties were at least arguably at an impasse. In these circumstances, and in light of the complaint allegations, I shall at this point address the merits of the complaint with respect to the negotiations from March through November. If the Company bargained in good faith during this period, then the pertinent complaint allegations should be dismissed. If the complaint allegations are meritorious, then I should next address the question of whether a remedial order would be warranted in light of the resumed negotiations in 1993. See and compare *Fire Fighters*, 304 NLRB 401, 403, 416 (1991).

In determining the merits of an alleged overall failure and refusal to bargain in good faith, it is necessary to consider the totality of the evidence concerning the negotiations and the circumstances surrounding those negotiations. In making that appraisal, the Board and the administrative law judge cannot be limited as a practical matter, and are not limited to particular elements set forth in the complaint or otherwise argued by the General Counsel. The allegation of failure and refusal to bargain in good faith is complete in itself, as an alleged unfair labor practice. *Griffin Inns*, 229 NLRB 199 (1977); *Lee Deane Products*, 181 NLRB 1047, 1048 (1970).

On consideration of the evidence, including matters previously discussed, I find that the Company had at all times an overriding concern to prevent the spread of unionization at its facility. That concern governed its strategy in the negotiations. To achieve its goal, the Company entered the negotiations with a fixed determination to avoid reaching a contract with the Union. As part of its strategy, the Company advanced and adhered to harsh, regressive, and discriminatory proposals, and adamantly rejected union proposals, without any valid subjective or objective basis, advancing false reasons or no reasons at all, knowing that its positions were predictably unacceptable to the Union. The Company thereby failed and refused to bargain in good faith with the Union.

As indicated, Felici testified with respect to the negotiations, that he neither knew nor considered how the Union or the unit employees would react to each company proposal. Rather, he (or the Company) would decide what was in the best interests of the Company and the Union. Felici added that he viewed the bargaining as a ''give and take'' process.

Felici's professed approach to the negotiations represented the antithesis of good-faith bargaining. In order to engage in good-faith bargaining, it is necessary to understand the wishes of the other party, and to attempt, where feasible, to accommodate those wishes. In fact, the Company understood from the outset, the preferences and aspirations of the union and the unit employees. The Company was fully aware, from the preliminary discussions and the Union's initial contract proposal, that the unit employees were generally satisfied with existing benefits and wages, but were concerned about job security. They wanted meaningful union representation, including a grievance-and-arbitration procedure, and some form of union security, coupled with dues checkoff.

Knowing and understanding the unit employees' wishes, the Company deliberately presented and adhered to proposals and positions which were plainly calculated to thwart those wishes. The Company proposed, for the unit employees, significant reductions or restrictions on existing benefits and conditions of employment. These included, as discussed, the Company's proposals on shift differential, overtime, sick leave, holidays, jury duty, and layoff and recall. The Company also proposed wage reductions for most of the unit employees, although it had never reduced employee wages, and did not plead financial hardship. The Company advanced and adhered to such proposals, without any rational basis, advancing false or pretextural reasons, or no reasons at all.

Notwithstanding the unit employees' desire for job security and meaningful union representation, the Company advanced and adhered to proposals which would significantly deprive the Union and the unit employees of rights which they would have even in the absence of a contract. Under the Company's proposals, the Union would have no rights to bargain over such critical matters as subcontracting, pensions, and wage rate progression. Employees could not grieve over discipline and discharge (under the management-rights clause), or refuse to cross a primary picket line. The Company's proposals, when viewed in their entirety, rendered its agreement on a grievance-and-arbitration procedure largely meaningless.

The Company's professed indifference to the wishes of the Union and unit employees contrasted sharply with its demonstrated solicitude toward the wishes and attitudes of its unorganized employees. Shortly after the Union's certification, and prior to commencement of negotiations, the Company initiated its intensive survey of employee attitudes. The Company repeatedly expressed its determination to accommodate its employees' preferences, and redress their grievances. The Company assured the unorganized employees that it would not change existing benefits, unless the changes benefited the employees. The Company pointedly informed the employees on June 25 that they, but not the unit employees, would receive a 4.5-percent wage increase. The Company also implemented a grievance procedure for the unorganized personnel, which in some respects was superior to its proposals in the contract negotiations. The grievance procedure included matters reserved to the Company under its management-rights proposal, e.g., suspension pending discharge.

The Company further demonstrated its bad faith by its unilateral failure to grant the unit employees the general wage increase, and by its related course of conduct. That conduct, as discussed, included misrepresentations and failure to inform the Union of the Company's intentions.

The Company also demonstrated its bad faith by presenting its last-minute (November 9) CQI proposal. As discussed, the Company repeatedly assured the Union that CQI was voluntary, and not a matter for contract negotiation. When, as a result of significant union concessions, the parties appeared to be moving toward a contract, the Company injected its mandatory CQI proposal into the negotiations, including its punitive proposal that the job steward could not serve as team leader. As discussed, the CQI proposal was not made in good faith, but was designed to thwart agreement between the parties.

The Board certified the Union as representative of all full-time and regular part-time skilled maintenance and groundskeeping employees, excluding all other employees. Nevertheless, the Company adamantly adhered to its proposal on recognition to exclude the only regular part-time em-

ployee, and to include in the unit, casual and other employees who were neither full-time nor regular part-time employees. The Company refused even to agree to the Union's counterproposal to red circle the incumbent regular part-time employee. The Company, by insisting on changing the certified bargaining unit, engaged in conduct violative of Section 8(a)(5) of the Act. *NLRB v. Southland Cork Co*., 342 F.2d 702, 706 (4th Cir. 1965); *Beyerl Chevrolet*, 221 NLRB 710 (1975). Therefore, the Company's conduct may properly be considered as evidence of an overall refusal to bargain in good faith. It is also significant that notwithstanding union proposals concerning part-time employees (including retention of existing benefits), the Company misled the Union by waiting until the 10th bargaining session, on July 23, to present its proposal on recognition.

I further find that the Company's adamant refusal to consider either checkoff or any form of union security demonstrates that the Company entered into the negotiations with a fixed determination not to agree to either, and further evidences overall bad-faith bargaining. The Company was well aware that dues checkoff and union security were matters of great importance to both the Union and the unit employees. Nevertheless, from the outset of the negotiations, the Company asserted an unyielding position. The Company asserted, in sum, and adhered to its position, that its ''philosophy'' was that the unit employees should decide whether to join the Union, and that the Union should be responsible for collecting dues. The Company further asserted that it did not collect for other organizations, and would not start with union dues.

In fact, the Company had no policy against collecting for other organizations. The Company makes deductions from employee paychecks for a multitude of items, including United Way contributions. When confronted with this fact, Director of Human Resources Bramble lamely explained that United Way contributions were voluntary, and the Company had been deducting for United Way for a long time. However, dues checkoff is also voluntary. Union dues cannot be deducted from an employees' paycheck unless the employee authorizes such deduction, and the Union's checkoff proposal so provided. Whether the Company had been deducting for United Way for a long time or a short time was irrelevant. The Company's records indicate that it reserves code numbers for additional deductions, i.e., that it has a flexible policy which provides and allows for new or additional deductions.

In its brief, the Company argues that it proposed, as an alternative to checkoff, that job stewards be authorized to collect union dues. However, in the negotiations, the Company never told the Union or took the position that it would agree to such authorization as a substitute for checkoff. Moreover, dues checkoff is not simply an accommodation to the Union. It is equally important as a convenience and benefit to the unit employees. Furthermore, the steward article, as proposed by the Company and as tentatively agreed to by the parties, was virtually useless as an effective means of dues collection. The unit employees worked on three shifts, and worked throughout the Hospital. The article tightly restricted the steward's movements and times when he could perform his union duties. In these circumstances, the proposed article did not provide a viable method for dues collection.

This leaves the Company's ''philosophical'' assertion that the Union should be responsible for collecting dues. In light of the Company's overall course of conduct, including its unlawful efforts to isolate the unit employees and insulate the unorganized employees from unionization, I find that the Company's adamant position on checkoff was motivated solely by hostility toward unionization.

The Union's initial proposed union-security clause, providing in sum for a ''union shop,'' was lawful. *Electronic Workers Union v. NLRB*, 41 F.3d 1532, 1538 (D.C. Cir. 1994). The proposed clause provided that it would be operative only to the extent permitted by law. The Company, in the negotiations, never objected to the Union's proposal on grounds that the proposal was unlawful. Rather, the Company based its opposition solely on its alleged philosophy that the unit employees should decide whether or not to join the Union.

In an effort to meet the Company's stated objection, the Union proposed an alternative maintenance of membership clause, under which only those employees who had voluntarily joined the Union, would be required to maintain their membership during contract term. The Company responded by filibustering, i.e., pretending not to understand the Union's proposal, although the Company knew full well what it meant. The Company offered no new reason for rejecting this proposal.

In its brief, the Company suggests that it refused to consider or agree to union security because the Company had a good-faith doubt as to the Union's continued majority status. However, in the negotiations, the Company never questioned the Union's majority status, and never disputed the Union's assertion that nearly all of the unit employees were union members. Such a belated assertion further tends to indicate a lack of good faith by the Company.

In sum, for the reasons discussed, I find that the Company's asserted positions with respect to dues checkoff and union security demonstrated that the Company was not bargaining in good faith. Where, as here, the employer adamantly opposes union security and checkoff on vague or generalized ''philosophical'' grounds or questionable assertions of policy, the inference is warranted that the Employer entered negotiations with a fixed intention not to consider or agree to any form of union security or checkoff, and thereby violated Section 8(a)(5) and (1) of the Act. *Hospitality Motor Inn*, 249 NLRB 1036, 1040 (1980), enfd. 667 F.2d 562 (6th Cir. 1982), cert. denied 459 U.S. 969 (1982); *Sweeney & Co. v. NLRB*, 437 F.2d 1127, 1134–1135 (5th Cir. 1971); *Rockingham Machine-Lunex Co*., 255 NLRB 89, 107 (1981), enfd. 665 F.2d 303 (8th Cir. 1981); *Carolina Paper Board Corp*., 183 NLRB 544, 551 (1970).[4]

The Company further evidenced lack of good faith by its piecemeal approach to the negotiations, which predictably frustrated the pace of negotiations, and frustrated movement toward a contract. The Company never presented a comprehensive proposed contract, or offered to use the Union's

[4] The case authorities relied on by the Company are not in point. *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976), involved a constitutional question, and not one arising under the Act. In *Glomac Plastics v. NLRB*, 592 F.2d 94, 97 (2d Cir. 1979), the court affirmed the Board's determination that the employer failed to bargain in good faith. Other cases cited by the Company did not involve factual situations comparable to the present case.

comprehensive proposals as a framework for negotiations. Instead, the Company, over a period of nearly 6 months, presented its proposals on a piecemeal basis, in no coherent order, culminating in its last-minute CQI proposal. The Company presented its job classification proposal before presenting its wage proposal, and presented its no strike-no lockout proposal before presenting its proposal on grievance and arbitration. This approach further demonstrated a lack of good-faith intent to reach a contract. See *Hotel Roanoke*, 293 NLRB 182, 184–185 (1989); *Preterm, Inc*., 240 NLRB 654 fn. 3 (1979).

G. *The 1993 Negotiations*

Having determined that the Company failed and refused to bargain in good faith with the Union, I shall at this point review the resumed negotiations in 1993 in order to determine whether a remedial bargaining order is warranted in light of those negotiations.

By letter dated February 25, 1993,[5] to company counsel, the Union proposed in sum as follows: The Union would withdraw its unfair labor practice charges and give the Company a release to date. Employees Kevin Ireson and Edward Hoxter (evidently terminated) would also give releases to the Company for conduct to date. The Company would reinstate Ireson and Hoxter to their former positions, make them whole for their losses, and accept the Union's November 9 contract proposal.

The parties thereafter resumed negotiations, meeting on March 29. This was Company Assistant Director of Human Resources Felici's last session.

The Company presented modified versions of its proposals on CQI and seniority. On CQI, the Company eliminated references to topics of discussion, and provided that the Union would receive copies of minutes. On seniority, the Company included provision for seniority rank and posting of a seniority roster. There were no other material changes. The Union accepted the Company's seniority proposal. There was no agreement on CQI.

The parties reviewed the Union's October 30 comprehensive proposal. The Company requested a clearer definition of the Union's ''Agency Shop'' proposal (as discussed, the Company understood that the Union was proposing a maintenance of membership clause). The Company continued to reject checkoff and any form of union security, whether union shop or maintenance of membership, asserting that it wanted nothing to do with locking in membership. The Union indicated a willingness to accept CQI in exchange for a modified union shop.

On wages, the parties discussed red-circling, coupled with a 4.5-percent wage increase. There was no agreement. However, with respect to establishment of rates and wage progression, the Union agreed in principle to a company proposal that decisions could be grieved to the company president, but would not be subject to arbitration.

The parties discussed, but remained in disagreement on, other matters, including shift differential, overtime, vacations, holidays, sick days, pension plan, contract duration, and placement of employee Phillips. The Company adhered to its offer to agree to a 4-percent vacation bonus for regular part-time employees, if the Union accepted the 4-day minimum for paid sick days. The Company rejected the Union's October 30 and November 9 counterproposals on vacations. The Union indicated a willingness to accept the Company's proposal on recognition. The Company stated that it would adhere to its practice of replacing personal tools broken on the job, although the plant operating manual provided otherwise. There was no disagreement on this.

The parties next met on May 17. Bramble replaced Felici in the negotiations. At this session, the Union made numerous and significant concessions, signing off on the Company's last proposals. The Company made no new substantive concessions. Muller testified that the Union made its concessions in order to narrow the areas of disagreement, but could not agree to all of the Company's proposals.

The parties signed off on the following company (last) proposals: vacations (with nothing for part-time employees), CQI, seniority (not for part-time employees), pension (with no union bargaining rights), job stewards, overtime (with exclusion of nonworktime in determining overtime), and no-strike no-lockout (with no primary picket line exception). The parties also signed off on a company proposal on tool storage, distribution, and inventory. The proposal incorporated the Company's current practice and position, that maintenance personnel must provide their basic handtools, but must keep such tools on the company premises. The Union also agreed to withdraw its proposal for reclassification of employee Phillips. The Union offered to accept the Company's proposal on holidays if the Company agreed to red circle incumbent employees at their present level of holidays. The parties agreed in principle on the Company's recognition article.

The parties next met on July 14. The Company offered to agree to the Union's red-circling offer on holidays, if the Union withdrew its proposal for checkoff. The Union emphatically rejected the Company's offer. The Union announced that it was withdrawing its maintenance of membership proposal, and would consider only a standard union-security clause. The Union said that there was no purpose in talking further if the Company was unwilling to move on union security and checkoff.

The Union asked if the Company would agree to a 4.5-percent wage increase, retroactive to July 1992. The Company said that it would consider the matter, but made no formal proposal.

There were no agreements at the July 14 session. Guardiani testified, and his notes indicate, that at that session, the Company presented a slightly revised version of its sick days' proposal, which was not signed off on. No such proposal was presented in evidence. Muller initially testified that at some point in the 1993 negotiations, the parties agreed to the Company's sick days' proposal, including the 4-day minimum. However, he subsequently testified that the matter was still open as of the last session on December 22. Guardiani's notes for the last session indicate that sick time was one of the remaining open issues. No signed-off proposal on sick days was presented in evidence. In sum, the evidence tends to indicate that the parties never reached agreement on a sick days' article.

At the July 14 session, the Company raised the matter of the Union's failure to pay its share of the cost of negotia-

[5] All dates in this sec. III,G are for 1993, unless otherwise indicated.

tions. The Company previously raised this matter in letters to the Union.

During the interval between the July 14 and December 22 bargaining sessions, the Company on several occasions notified the Union of proposed changes in terms and conditions of employment. The Company on each occasion asked the Union if it objected to the changes. The Union did not object to any of the changes.

At the last session on December 22, the Company proposed that the Union withdrew all pending unfair labor practice charges, including an 8(a)(3) charge filed by or on behalf of Unit Steward Doyle Donovan, in exchange for a 4.5-percent retroactive wage increase. By this time, the Regional Director (on July 20) had issued the present complaint. The Regional Director subsequently declined to proceed on Donovan's charge. Guardiani testified that the Company's proposal did not include red-circling, i.e., that for most of the unit employees, the Company was proposing a theoretical rather than an actual wage increase. By an exchange of correspondence shortly before the December 22 session, the Company proposed, and the Union agreed, that the unit employees would receive the same 1-percent bonus (ranging in amount from $20 to $500) as other company personnel, in lieu of a 1993 across-the-board rate increase.

The Union responded that it would discuss wages in the context of a total contract package. The Union indicated that it would be receptive to ''me too'' on wages, i.e., that the unit employees would receive the same increases as other personnel. After a caucus, the Company amended its proposal to exclude reference to Donovan's charge. The Union adhered to its position. There was no further movement by either party, and the session adjourned.

As of December 22, the parties had not reached agreement on wages, shift differential, holidays, sick days, union security, dues checkoff, and contract duration. They had agreed in principle on recognition, but had not reduced their agreement to writing. Muller testified that if union security and checkoff were the only outstanding issues, the Union might have attempted to persuade the unit employees that they could seek such provisions in the next contract. However, the Union never so informed the Company. Guardiani testified that he understood that the Union would not agree to a contract without union security and checkoff.

H. *Concluding Findings Concerning the Effect of the 1993 Negotiations on the Company's Unlawful Failure and Refusal to Bargain in Good Faith*

On consideration of the 1993 negotiations, I find that the Company continued on its course of failing and refusing to bargain in good faith with the Union. Therefore, the Company was and continues to be in violation of Section 8(a)(5) and (1) of the Act, and a remedial bargaining order is warranted.

The Company rigidly adhered to positions taken in the 1992 negotiations, including those, as previously found, which were not advanced in good faith. For its part, the Union demonstrated flexibility, and a continued willingness to make deep and significant concessions in order to move toward agreement on a contract. Virtually all movement toward such agreement was generated by union acceptance of company proposals. The Union offered to accept the Company's humiliating CQI proposal in exchange for a modified union shop. The Company would not budge from its predetermined rejection of any form of union security, but the Union nevertheless signed off on CQI. The Union withdrew its proposal for a maintenance-of-membership clause, only after it became apparent that the Union's broad concessions of May 17 did not stimulate any significant movement by the Company.

The fact that the Union, in a desperate effort to move toward a contract, accepted company proposals, including those made in bad faith, does not preclude a finding that the Company failed and refused to bargain in good faith. *General Electric Co. v. NLRB*, 400 F.2d 713, 727 (5th Cir. 1968), cert. denied 394 U.S. 904 (1969). Indeed, even if a union totally capitulates in the face of bad-faith bargaining, and agrees to a contract (in essence, on the employer's terms), that result does not preclude a finding of employer failure and refusal to bargain in good faith. *NLRB v. General Electric Co.*, 418 F.2d 736, 746 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970). Rather, the Union's conduct, as here, demonstrates good-faith bargaining on its part. I find without merit, the Company's argument that the Union failed or refused to bargain in good faith.

In finding that the Union bargained in good faith, I specifically find that the Company was not excused from remedying its unlawful conduct by reason of the Union's evident failure to pay its share of the cost of negotiations. Rather, that is a matter to be taken up in resumed negotiations, when the Company commences bargaining in good faith.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time skilled maintenance and groundskeeping employees employed at the Company's 701 East Marshall Street, West Chester, Pennsylvania facility, excluding all other employees, office clericals, guards and supervisors as defined by the Act, constitute a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act.

4. Since December 3, 1991, the Union has been and is the exclusive collective-bargaining representative of the Company's employees in the unit described above.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Company has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and by unilaterally failing and refusing to provide the unit employees with a scheduled annual across-the-board wage increase without affording the Union advance notice and an opportunity to bargain concerning such action, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and from any like or related unlawful conduct, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Company be ordered to, on request, bargain in good faith with the Union, and compensate the unit employees for its failure to grant them the July 1992 general wage increase. Compensation shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6] The Company shall be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of reimbursement due.

The General Counsel has requested (G.C.'s Br. p. 62) that as part of an appropriate remedy, the certification year should be extended to enable a reasonable period of good-faith bargaining. The Union was certified on December 3, 1991. Contract negotiations began on March 17, 1992. The Company commenced its unlawful conduct on April 9, when it responded to the Union's proposals with a fixed determination to avoid reaching a contract, asserting positions which were not made in good faith. By engaging in a course of bad-faith bargaining, the Company substantially deprived the employees of the benefit of representation by a certified union, and deprived the Union of the benefit of such certification. Therefore, I am granting the General Counsel's request, and recommending that, on resumption of bargaining and for 8 months thereafter, the Union be regarded as if the initial year of certification had not yet expired. See *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, the Chester County Hospital, West Chester, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of all its employees in the above-described appropriate unit.

(b) Unilaterally changing terms and conditions of employment of unit employees without affording the Union prior notice and an opportunity to negotiate and bargain concerning such changes as the collective-bargaining representative.

(c) Engaging in surveillance of its employees' union activities, or creating the impression of surveillance of such activities by photographing or videotaping employee union activity or pretending to engage in such conduct.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Regard the Union on resumption of bargaining and for 8 months thereafter as if the initial year following certification had not yet expired.

(c) Compensate the unit employees for its failure to grant them the July 1992 general 4.5-percent wage increase, as set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due under the terms of this Order.

(e) Post at its West Chester, Pennsylvania facility copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain collectively in good faith with International Brotherhood of Teamsters, AFL–CIO, Local 312 as the exclusive collective-bargaining representative of our employees in the appropriate unit. The appropriate unit is:

All full-time and regular part-time skilled maintenance and groundskeeping employees employed by us at our 701 East Marshall Street, West Chester, Pennsylvania facility, excluding all other employees, office clericals, guards and supervisors as defined by the Act.

WE WILL NOT unilaterally change terms and conditions of employment of our unit employees without affording Local 312 prior notice and an opportunity to negotiate and bargain concerning such changes as the exclusive collective-bargaining representative.

WE WILL NOT engage in surveillance of our employees' union activities, or create the impression of surveillance of such activities by photographing or videotaping employee union activity or pretending to engage in such conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities or to refrain therefrom.

WE WILL, on request, bargain collectively with Local 312 as the exclusive collective-bargaining representative of our employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL regard Local 312 on resumption of bargaining and for 8 months thereafter as if the initial year following certification has not expired.

WE WILL compensate the unit employees for our failure to grant them the July 1992 general 4.5-percent wage increase, with interest.

THE CHESTER COUNTY HOSPITAL